Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

NEW YORK DEPARTMENT STORES
DE PUERTO RICO, INC.,

Petitioner,

v.

ALMACENES RODRÍGUEZ, INC. and
E. RODRÍGUEZ & SONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 10(A) of the Regulations of the Circuit Court of Appeals of the Commonwealth of Puerto Rico provides that such courts "shall" render a judgment that "shall include a statement of facts and a discussion and analysis of the issues raised." The question presented is whether the courts of the Commonwealth of Puerto Rico deprived petitioner of due process by failing or refusing to apply Rule 10(A).

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Petitioner New York Department Stores de Puerto Rico, Inc. ("NYDS")

2. Respondent Almacenes Rodríguez, Inc. ("ARI")

3. Respondent E. Rodríguez & Sons, Inc. ("ERSI")

STATEMENT PURSUANT TO RULE 29.6

NYDS is owned 100% by Marshalls of MA, Inc., which is not publicly traded.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	xii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
A. The Parties	2
B. Factual Background	3
C. The Trial Court's Decision	5
D. The Summary Denial by the Circuit Court of Appeals	6
E. NYDS's Motion for Reconsideration to the Circuit Court of Appeals	7

Contents

Page

F. The Supreme Court of Puerto Rico Declines to Hear the Appeal 7

Reasons for Granting the Writ 9

I. The Appellate Court's Failure To Comply With Rule 10(A) Was Arbitrary And Capricious, In Violation Of The Substantive Due Process Guarantees Of The United States Constitution. 9

A. Rule 10(A) Was Adopted to Guarantee Due Process of Law 9

B. Rule 10(A) Requires an Explanation and Analysis of Legal Issues 14

C. The Circuit Court's Violation of Rule 10(A) Also Constituted a Violation of Federal Due Process 17

II. The Lower Courts Are Divided On Whether Violations Of State Law Or Procedure Also Constitute Due Process Violations Where They Deprive A Claimant Of A Protected Interest. 20

III. The Conflict Of Authority Raises Broad Federalism Concerns. 25

Contents

	Page
IV. The Decision Of The Puerto Rico Supreme Court Is Final.	27
Conclusion	30

TABLE OF CITED AUTHORITIES

Page

Cases:

Arnett v. Kennedy, 416 U.S. 134 (1974) 25

Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71 (1988) 8

Bignall v. North Idaho College, 538 F.2d 243 (9th Cir. 1976) 21, 22

Boddie v. Connecticut, 401 U.S. 371 (1971) 14, 19

Brenna v. Southern Colorado State College, 589 F.2d 475 (10th Cir. 1978) 21, 22

Brown v. Texas A&M Univ., 804 F.2d 327 (5th Cir. 1986) 24

Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886 (1961) 26

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 17

Carlos A. Maldonado Bermudez v. Nilsa Maldonado Gonzalez, __ P.R. Dec. __, 96 JTS 86, 1250 (P.R. 1996) 9, 10, 14

Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) 26

Cited Authorities

Page

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 27, 28, 29

Departamento de la Familia v. Shrivers Otero, __ P.R. Dec. __, 98 JTS 46 (P.R. 1998) 15, 16

Evitts v. Lucey, 469 U.S. 387 (1985) 20

Franceski v. Plaquemines Parish School Bd., 772 F.2d 197 (5th Cir. 1985) 24

Hathorn v. Lovorn, 457 U.S. 255 (1982) 8

Hicks v. Oklahoma, 447 U.S. 343 (1980) 22

Int'l Basic Econ. Corp. v. Blanco Lugo, 267 F.2d 263 (1st Cir. 1959) 29

Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1 (7th Cir. 1974) 17

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) 26

Levine v. Torvik, 986 F.2d 1506 (6th Cir. 1993), *cert. denied*, 509 U.S. 907 (1993) 25

Levitt v. University of Texas at El Paso, 759 F.2d 1224 (5th Cir. 1985) 22, 23

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 18, 19, 20, 25

Cited Authorities

Page

Martinez v. California, 444 U.S. 277 (1980) 19

Mathews v. Eldrige, 424 U.S. 319 (1976) 26

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 19

Munn v. Illinois, 94 U.S. 113 (1876) 26

Murphy v. Collins, 26 F.3d 541 (5th Cir. 1994) ... 24

Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 18

Pueblo v. Esquilín Díaz, __ P.R. Dec. __, 98 JTS 139, 193, 1998 WL 740944 (P.R. 1998) 20

Pueblo v. Serbia, 78 P.R. Dec. 788 (P.R. 1955) ... 20

Purisch v. Tennessee Technological University, 76 F.3d 1414 (6th Cir. 1996) 24, 25

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 27

Rupert Hermanos, Inc. v. People of Puerto Rico, 118 F.2d 752 (1st Cir. 1941) 29

Smith v. City of Picayune, 795 F.2d 482 (5th Cir. 1986) 23, 24

Cited Authorities

	Page
Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910)	26
Stanley v. Illinois, 405 U.S. 645 (1972)	26
Stern v. Tarrant County Hospital Dist., 778 F.2d 1052 (5th Cir. 1985)	24
Torres v. Puerto Rico, 442 U.S. 465 (1979)	18
Vitek v. Jones, 445 U.S. 480 (1980)	25
Woodard v. Los Fresnos Indep. School Dist., 732 F.2d 1243 (5th Cir. 1984)	24
Statutes:	
28 U.S.C. § 1257	27
28 U.S.C. § 1258	2, 27
Act 11 of June 2, 1993, Art. 5(c), P.R. Laws Ann. tit. 4, § 37-1(c) (1993), *repealed by* P.R. Laws Ann. tit. 4, § 23m (1994)	12

Cited Authorities

Page

United States Constitution:

Fifth Amendment 2, 17

Fourteenth Amendment ..... *passim*

Rule:

Rule 10(A) of the Regulations of the Puerto Rico Circuit Court of Appeals ..... *passim*

Other Authorities:

Advisory Commission on the Structure and Operation of the Court of First Instance, Report (1987) 12

Committee on Judicial Reform and Administration of the Court of First Instance, Supreme Court of Puerto Rico Judicial Conference, Final Report on Judicial Reform (1994) 11

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Office of the Governor, Governor's Message on the Reorganization Plan No. 1 of 1994 (April 15, 1994) 13

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Page

Senate of Puerto Rico, Minority Report to House Project 382, 12th Legis. Assembly, 1st Ordinary Sess. (P.R. 1993) 20

Sessions Log, Proceedings and Debates of the 12th Leg. Assembly, 1st Ordinary Sess., Vol. XLIV, No. 43 (P.R. May 18, 1993) 12

Statement of the Presiding Judge of the Supreme Court Before the Judicial Commission of the Senate Regarding Senate Project Number 140 (April 22, 1993) 13

Jose A. Cuevas Segarra, *Práctica Procesal Puertorriqueña – Práctica Apelativa* (Luiggi Abraham ed., 2d ed. 1995) 16

TABLE OF APPENDICES

Page

Appendix A — Decision Of The Supreme Court Of Puerto Rico, Dated May 14, 1999 ..... 1a

Appendix B — Decision Of The Circuit Court Of Appeals, San Juan Regional Circuit, Dated September 23, 1998 ..... 2a

Appendix C — Decision Of The Court Of First Instance, San Juan Superior Part, Dated December 23, 1996 ..... 9a

Appendix D — Decision Of The Supreme Court Of Puerto Rico Denying First Motion For Reconsideration, Dated June 18, 1999 ..... 56a

Appendix E — Decision Of The Supreme Court Of Puerto Rico Denying Second Motion For Reconsideration, Dated July 16, 1999 ..... 57a

Appendix F — Rule 10(A) Of The Regulations Of The Puerto Rico Circuit Court Of Appeals 58a

Petitioner New York Department Stores de Puerto Rico, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the Commonwealth of Puerto Rico, denying a writ of certiorari to review the decision of the Circuit Court of Appeals, San Juan Regional Circuit, rendered on September 23, 1998.

OPINIONS BELOW

The following decisions are not reported, and are reprinted, in translation, in the Appendix to this Petition:

1. Decision of the Court of First Instance, San Juan Superior Division, rendered on December 23, 1996 (App. at 9a);[1]

2. Decision of the Circuit Court of Appeals, San Juan Regional Circuit, rendered on September 23, 1998 (App. at 2a);

3. Decision of the Supreme Court of Puerto Rico, rendered on May 14, 1999 (App. at 1a);

4. Decision of the Supreme Court of Puerto Rico, rendered on June 18, 1999 (App. at 56a); and

5. Decision of the Supreme Court of Puerto Rico, rendered on July 16, 1999 (App. at 57a).

STATEMENT OF JURISDICTION

On May 14, 1999, the Supreme Court of Puerto Rico declined to issue a writ of certiorari to review the decision

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1. All documents included in the Appendix are originally in Spanish. For the convenience of the Court, we have translated these documents into English.

of Circuit Court of Appeals. On June 18, 1999, the Supreme Court of Puerto Rico denied Petitioner's motion for reconsideration. On July 16, 1999, the Supreme Court of Puerto Rico denied Petitioner's second motion for reconsideration. This Court has jurisdiction to review the judgment of the Supreme Court of Puerto Rico under 28 U.S.C. § 1258 ("Section 1258").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this proceeding are the Fifth and Fourteenth Amendments to the United States Constitution and Rule 10(A) of the Regulations of the Puerto Rico Circuit Court of Appeals ("Rule 10(A)"). Rule 10(A) provides as follows:

> The corresponding panel of the Circuit Court of Appeals shall resolve the writs submitted for its consideration through a resolution or judgment, which shall include a statement of facts and an exposition and analysis of the issues raised.

App. at 58a.

STATEMENT OF THE CASE

A. The Parties

Petitioner NYDS is a corporation organized under the laws of Puerto Rico. App. at 16a. Until 1994, it was engaged in the retail sale of general merchandise through a chain of department stores located throughout Puerto Rico known as "New York Department Stores." App. at 16a, 29a. Respondents ARI and ERSI are separate corporations organized under the laws of Puerto Rico. App. at 13a-14a. ARI and ERSI are registered with the Puerto Rico

government as distinct corporations, file separate taxes, and maintain separate accounts, books, and bank accounts. *Id.*

B. Factual Background

At the beginning of 1992 or the end of 1993, NYDS and ARI entered into negotiations for ARI to operate the shoe departments in ten NYDS stores. App. at 17a. In connection with these negotiations, the parties exchanged drafts of a license agreement. App. at 18a-20a. All the drafts that were exchanged reflected the parties' agreement to include a non-assignability clause, which provides that the written consent of NYDS would be necessary before ARI could assign any of ARI's obligations under the agreement. App. at 48a-49a. One specific provision as to which NYDS and ARI did not agree, however, concerned the agreement's termination. App. at 17a-19a.

In May or June of 1993, NYDS extended an offer to ARI by forwarding a draft license agreement contract, dated May 19, 1993, which provided that the license agreement would be binding on a future purchaser of the stores. App. at 19a-20a. That draft was signed by Glen Irelan, the president of NYDS. App. at 20a. However, the Board of Directors had never authorized Mr. Irelan to enter into such license agreements, and it had not approved the text of the specific draft agreement that Mr. Irelan forwarded to ARI. App. at 29a. For the next two to three months, NYDS received no response from ARI. App. at 22a.

To advance the ongoing negotiations, and as an accommodation to ARI, NYDS authorized ARI to begin sales operations in a limited number of NYDS stores. App. at 20a. Five such departments were in operation by May, 1993. App. at 21a. However, unbeknownst to NYDS, ARI never opened the shoe departments. App. at 22a. Rather, ARI secretly allowed ERSI — a wholly separate corporation —

to open and operate the departments. *Id.* ARI had never previously informed NYDS that ERSI was opening and operating those departments, and never sought NYDS's consent to have ERSI operate the departments. *Id.* It was not until October, 1995 (more than two years later), after ARI had sued NYDS, and in the course of discovery, that NYDS learned that ERSI — not ARI — had opened the shoe departments. *Id.*

In late August, the Board of NYDS first learned that the May 19, 1993 draft license agreement that Mr. Irelan had forwarded to ARI provided that the license agreement would be binding on a future purchaser of the stores. This provision was inconsistent with the business strategy of the Board, which was to develop the business of NYDS, and then resell the company at a profit. App. at 18a. In light of this business goal, the Board required the ability to terminate the agreement in the event the stores were sold. App. at 22a.

Very shortly thereafter, on September 1, 1993, NYDS withdrew its offer by informing ARI in writing that the draft license agreement had to be approved by the Board of Directors of NYDS, and that the Board would only approve an agreement that could be terminated in the event that NYDS sold its stock to a third party. *Id.*

Almost two weeks after NYDS withdrew its offer, on September 13, 1993, ARI returned to NYDS a signed copy of the May 19, 1993 draft license agreement. App. at 23a. However, the document that ARI returned contained material changes, reducing the number of stores that ARI agreed to operate. App. at 23a-24a. NYDS never accepted this counter-offer by ARI.

Consistent with the business strategy of its investors, on April 20, 1994, NYDS executed an agreement for the sale of its stock to Marshalls, Inc. App. at 27a. NYDS informed

Marshalls that ARI was interested in continuing to operate the shoe departments. App. at 28a. However, Marshalls rejected this option as contrary to their concept of marketing. *Id.* Operations at the NYDS stores ceased on July 18, 1994, at which time ERSI vacated the departments it was operating in the NYDS stores. App. at 29a. In November 1994, some of the NYDS stores opened under the name of Marshalls. *Id.* Neither ARI nor ERSI has had any role in the operation of the new Marshalls stores.

On June, 14, 1994, ARI sued NYDS in the Court of First Instance, San Juan Superior Part, for breach of contract. App. at 7a.

C. The Trial Court's Decision

Notwithstanding the overwhelming evidence to the contrary, on December 23, 1996, the Court of First Instance ruled that NYDS and ARI had formed a contract, App. at 38a, 48a, and that NYDS was liable to ARI for breach of contract. App. at 55a. Despite the fact that ARI and ERSI are separate legal entities that are registered with the Puerto Rico government as separate corporations, file separate taxes, and maintain separate accounts, books, and bank accounts, the court allowed ERSI to assert claims as an additional plaintiff. App. at 50a.

The trial court's decision misconstrued several basic and important provisions of Puerto Rico contract and corporate law. First, the trial court erred in ruling that NYDS and ARI had formed a binding contract. NYDS withdrew its offer on September 1, 1993, over two weeks before ARI purported to accept the offer, and then ARI extended a counter-offer which included a material change in the number of stores that the draft license agreement was to cover. This counter-offer was never accepted by NYDS. In addition, Mr. Irelan lacked authority to bind NYDS, and the Board of Directors of NYDS

never authorized a contract with ARI. Therefore, the court's decision misconstrued the law regarding the role of the directors in the management of a corporation.

In addition, even if NYDS and ARI had established a contractual relationship, ARI breached that contract by allowing ERSI, a wholly separate corporation, to operate the shoe departments without the knowledge or consent of NYDS. By treating ARI and ERSI as one corporate entity, the trial court in effect allowed ARI and ERSI to disregard the corporate form and pierce their respective corporate veils. This aspect of the trial court's decision misconstrues well-established authority in Puerto Rico, providing that a party that has adopted the corporate form for its protection may not then disregard that form when it is no longer convenient. In addition, by allowing ERSI to assert claims against NYDS, the trial court's decision contravened basic principles of Puerto Rico contract and tort law.

D. The Summary Denial by the Circuit Court of Appeals

On January 27, 1997, NYDS appealed the decision of the trial court to the Circuit Court of Appeals, San Juan Regional Circuit, raising the errors discussed above. On September 23, 1998, the Circuit Court of Appeals confirmed the trial court's ruling. App. at 8a. After restating portions of the trial court's finding of facts, the Circuit Court of Appeals stated as follows:

> After examining the appeals brief with the errors therein propounded, and after analyzing the bases which the Court of First Instance detailed to arrive at its conclusions, this Court accepts and adopts as its own such legal bases.

Id.

E. NYDS's Motion for Reconsideration to the Circuit Court of Appeals

On October 23, 1998, NYDS filed a motion for reconsideration before the Circuit Court of Appeals. In that motion, NYDS first raised the issue involved in this petition for certiorari. In paragraphs three and four of the motion papers, NYDS indicated that the decision of the Circuit Court of Appeals failed to comply with Rule 10(A) because it did not include a discussion and analysis of the issues raised. On February 9, 1999, the Circuit Court of Appeals denied NYDS's motion for reconsideration.

F. The Supreme Court of Puerto Rico Declines to Hear the Appeal

On March 24, 1999, NYDS filed a petition of certiorari with the Supreme Court of Puerto Rico. In that petition, NYDS again raised the violations at issue here. On May 14, 1999, the Supreme Court declined to issue the writ of certiorari, thereby upholding the decision of the Circuit Court of Appeals. App. at 1a. Thereafter, on June 1, 1999, NYDS filed a motion for reconsideration, which specifically characterized those claims as violations of federal due process.[2] The motion for reconsideration was denied on June

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2. Petitioner has adequately raised its federal due process claims below. Petitioner first raised the issue of the failure to comply with Rule 10(A) in the motion for reconsideration before the Circuit Court of Appeals. This was the same court that had committed the violation of Rule 10(A). Moreover, Petitioner raised this issue again in its petition for certiorari to the Puerto Rico Supreme Court, and its two motions for reconsideration before the Supreme Court. In the first motion for reconsideration before the Supreme Court, Petitioner specifically characterized the error as a violation of federal due process. Paragraph 3 of the motion for reconsideration specifically claims that the failure of the Circuit Court of Appeals failure to explain the reasoning behind its decision violated the due process guarantees of both the United States

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18, 1999. App. at 56a. On June 25, 1999, NYDS filed a second motion for reconsideration, again raising its due process claims. The second motion for reconsideration was denied on July 16, 1999. App. at 57a.

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Constitution and the Puerto Rico Constitution. In addition, Paragraph 19 discusses case law of this Court construing the due process provisions of the United States Constitution. This Court's prior decisions demonstrate that raising a federal issue in a motion for reconsideration before the highest court of a state adequately raises those issues for purposes of invoking this Court's jurisdiction. *See Hathorn v. Lovorn*, 457 U.S. 255 (1982). *Hathorn* involved a challenge to a Mississippi statute which governed the election of trustees of municipal school districts. *Id.* at 255. There, this Court granted certiorari to the Supreme Court of Mississippi to consider claims that were raised for the first time in the petition for rehearing filed before the Supreme Court of Mississippi. *Id.* at 262-65; *see also Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). Thus, even if Petitioner had first raised its claim in the motion for reconsideration, a procedural step analogous to the petition for rehearing at issue in *Hathorn*, *Hathorn* would dictate that those claims were adequately raised below.

This Court's decision in *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988), is inapposite. *Bankers Life* involved the question of whether the size of a punitive damages award violated the Excessive Fines Clause, the Due Process Clause, and the Contract Clause. *Id.* at 76. There the petition for rehearing before the Supreme Court of Mississippi only indicated that the punitive damages award "violates constitutional principles," *Id.* at 77, without specifying the Mississippi or United States Constitution. In fact, this Court found that the petition for rehearing did not refer to federal law at all. *Id.* at 78. Here, in contrast, Petitioner's motion for reconsideration explicitly referred to due process rights under the United States Constitution. In *Bankers Life*, the Court ruled that, had the petitioner raised its federal constitutional claims in the petition for rehearing, those claims would have been adequately raised to involve the jurisdiction of the Supreme Court. *Id.* at 77 ("*Hathorn* would be apposite were we to conclude that appellant had adequately raised its claims on rehearing.").

REASONS FOR GRANTING THE WRIT

This petition should be granted because it provides the Court an opportunity to resolve the conflict of authority that currently exists over whether the failure by a state or commonwealth to follow its own procedural requirements, consequently depriving a claimant of a property interest, constitutes a per se violation of substantive due process under the United States Constitution. The conflicting decisions of the lower federal courts on this issue have created substantial confusion concerning the relationship between the state and federal governments, a question with broad implications for all litigants throughout the judicial systems of the United States and Puerto Rico. This issue merits uniform treatment by all courts, and thus warrants the issuance of a writ of certiorari to the Supreme Court of Puerto Rico to resolve conflicts and to settle the law in this important area of constitutional jurisprudence.

I. THE APPELLATE COURT'S FAILURE TO COMPLY WITH RULE 10(A) WAS ARBITRARY AND CAPRICIOUS, IN VIOLATION OF THE SUBSTANTIVE DUE PROCESS GUARANTEES OF THE UNITED STATES CONSTITUTION.

A. Rule 10(A) Was Adopted to Guarantee Due Process of Law

Rule 10(A) was adopted by the Supreme Court of Puerto Rico, in order to implement the Judiciary Act of 1994 (the "Judiciary Act"), which was enacted by the Legislative Assembly of Puerto Rico. *See Carlos A. Maldonado Bermudez v. Nilsa Maldonado Gonzalez*, __ P.R. Dec. __, 96 JTS 86, 1250, 1253 (P.R. 1996).[3] As stated above, Rule 10(A) provides as follows:

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3. Citations in the form __ JTS __ refer to a well-established and commonly-cited reporting service in Puerto Rico, Jurisprudencia

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> The corresponding panel of the Circuit Court of Appeals shall resolve the writs submitted for its consideration through a resolution or judgment, which shall include a statement of facts and a discussion and analysis of the issues raised.

App. at 58a.

The Judiciary Act enacted a group of significant reforms to the Puerto Rico judiciary system. One of the objectives of the Judiciary Act was to provide litigants with a meaningful appeal of right in civil cases. A central component of this meaningful appeal was a written decision by the Circuit Court of Appeals, which included a statement of facts, *and* a *discussion* and *analysis* of the legal issues involved.

Rule 10(A) was the product of a dramatic reform of the Puerto Rico judicial system that began in 1992. An examination of the history of that reform demonstrates that the discussion and analysis mandated by Rule 10(A) is an essential due process protection that comes within the due process protections of the United States Constitution.

Before 1992, there was no intermediate appellate forum in the Puerto Rico judicial system. In civil cases, litigants who wished to appeal decisions of the trial court, the Court of First Instance, petitioned for discretionary review before the Puerto Rico Supreme Court. During this period, the

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del Tribunal Supremo de Puerto Rico. That citation represents the unique reference number that JTS has assigned to the decision at issue. To be more accurate, we have added after that unique number the page number of that volume where the decision begins, and, where necessary, a jump cite to the particular discussion that supports the proposition. For example, for the *Maldonado* case, the unique number that JTS has assigned is 96 JTS 86. The decision begins on page 1250 of that volume, and the particular passage that supports the proposition is found on page 1253.

Supreme Court would often deny discretionary petitions in a summary format, consisting of a simple phrase, "No ha lugar" (which roughly translates into English as "Denied"). Significantly, these one-sentence denials contained no explanation of the court's denial, and no discussion or analysis of the legal issues involved. Committee on Judicial Reform and Administration of the Court of First Instance, Supreme Court of Puerto Rico Judicial Conference, Final Report on Judicial Reform at 31 (1994) (hereinafter, "Judicial Reform Report").

In 1992, the legislature adopted a major overhaul to the judiciary system, in the form of Act No. 21. That Act created the Court of Appeals (the predecessor of the current *Circuit* Court of Appeals), and granted civil litigants an appeal as of right to that tribunal. To implement Act No. 21, the Supreme Court of Puerto Rico adopted a precursor to Rule 10(A), a provision that required that the then Court of Appeals discuss and analyze the issues raised in the appeal. However, the very next year, over the protests of the Puerto Rico judiciary, the legislature abolished the Court of Appeals and the right to appeal in civil cases, through Act No. 11 of June 2, 1993. *Id.* at 14. At that time, the legislature reinstated the preexisting regime, under which civil litigants were allowed a discretionary review of decisions from the Court of First Instance to the Supreme Court.

However, the 1993 amendments made one significant change to the Supreme Court's discretionary review that foreshadowed the adoption of Rule 10(A), and highlighted the importance of 10(A) in protecting the due process rights of Puerto Rico citizens. As stated above, prior to 1992, the Supreme Court's common practice was to issue summary denials of writs for discretionary review. These summary denials had raised concerns, both among the public and the bar, that the Supreme Court was not sufficiently reviewing

the merits of these discretionary writs. As a result, it was generally perceived that the summary denials undermined the general public's confidence in the Puerto Rico legal system. The effect of the summary decision format on the public's confidence in the Puerto Rico judiciary was described in a 1987 report as follows:

> When . . . there is not a *sufficient explanation* [regarding the reasons for the Supreme Court's denial of discretionary review], the impression remains that the court did not consider truly the merits of the case and that justice was not well served. Insistent criticism is perceived by the members of the bar due to the ever rising use of [summary denial format].[4]

See id. (quoting Advisory Commission on the Structure and Operation of the Court of First Instance, Report at 60 n.28 (1987)); *see also* Sessions Log, Proceedings and Debates of the 12th Leg. Assembly, 1st Ordinary Sess., Vol. XLIV, No. 43 at 1751-52 (P.R. May 18, 1993) ("Sessions Log") (Supreme Court's use of the summary denial format compromised "fundamental justice" and created "dismay" and "latent animosity" towards the Puerto Rico judicial system); *id.* at 1760 (requiring a reasoned opinion avoids "unnecessary future litigation" by eliminating confusion over the court's basis for a decision.); *id.* at 1755, 1757, 1763 (citing the importance of the right to a reasoned appeal). As a result, the 1993 amendments included a *special* provision which required that the Supreme Court explain its denials of discretionary review. Act 11 of June 2, 1993, Art. 5(c), P.R. Laws Ann. tit. 4, § 37-1(c) (1993), *repealed by* P.R. Laws Ann. tit. 4, § 23m (1994).

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4. The Puerto Rico legislative history and case law cited in this petition are all written in Spanish. We have translated the quoted excerpts.

One year later, the Judiciary Act reinstated the Court of Appeals and civil litigants' appeal as of right to that forum. In addition, the Supreme Court of Puerto Rico went out of its way to address the public's concern that the court system was not sufficiently considering the merits of appeals by adopting Rule 10(A). In other words, Rule 10(A) was adopted to ensure that all litigants in the Puerto Rico court system have the right to a meaningful appeal.

The due process importance of Rule 10(A) is clear from the legislative history discussing the adoption of the Judiciary Act. That legislative history states that the objectives of the Judiciary Act included "granting to the citizenry the *right to appeal* in civil and criminal cases, consecrating the principle of *equal justice* for all, of easy and *equal access* of the citizens to the government services of the judiciary branch." Office of the Governor, Governor's Message on the Reorganization Plan No. 1 of 1994 (April 15, 1994) (emphasis added). In addition, the Reorganization Plan was adopted in order to "allow citizens to assure the effective exercise of the right to appeal the decision of a judge of the Court of First Instance" and to provide them with "a real opportunity of appellate justice." Office of the Governor, Explicative Brief Report — Reorganization Plan No. 1 of 1994 — Judicial Branch, 21-22 (April 21, 1994); *see also* Statement of the Presiding Judge of the Supreme Court Before the Judicial Commission of the Senate Regarding Senate Project Number 140 (April 22, 1993), Sessions Log (In his statement before the Puerto Rico legislature opposing the abolition of the Court of Appeals in 1993 (predecessor of the Circuit Court of Appeals), the Presiding Judge of the Puerto Rico Supreme Court emphasized that the role of the Court of Appeals is to make fundamental justice accessible to citizens.). The Circuit Court's failure to include a discussion and analysis of the legal issues involved has deprived petitioner of its right of access to a meaningful appeal of the lower court's decision,

guaranteed by Rule 10(A). As this Court has recognized, state actions which infringe on the right of access to the judicial process can raise federal due process concerns. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371 (1971).

B. Rule 10(A) Requires an Explanation and Analysis of Legal Issues

Rule 10(A) requires a statement of the facts, a discussion of the legal issues involved, and an analysis of the issues involved. The case law interpreting Rule 10(A) has clearly established that Rule 10(A) requires an explanation of the Court's analysis of the legal issues involved. *Maldonado Bermudez* was a divorce action, in which the husband sought divorce on grounds of cruelty. 96 JTS 86, at 1251. The wife denied her husband's allegations, and in connection with her affirmative defenses, claimed that her husband in fact had treated *her* cruelly. *Id.* The trial court granted the divorce to the plaintiff husband, and the defendant wife appealed to the Circuit Court of Appeals. *Id.* The Circuit Court of Appeals confirmed the trial court's decision, but failed to discuss defendant's claims regarding the trial court's errors. *Id.* at 1252. There, the Supreme Court found that the Circuit Court of Appeals had violated Rule 10(A). The court held as follows:

> [Rule 10(A)] imposed on the Circuit Court of Appeals the duty of resolving all issues raised in the appeals before it. It further established the obligation of [resolving those issues] in a reasoned manner, which shall include a statement of facts, and a discussion and analysis of the issues that are raised. This, at the same time, has the effect of allowing this Court to adequately comply with our function of reviewing the case in the event any of the parties chooses to challenge before us the decision of the Circuit Court of Appeals.

Id. at 1253.

Departamento de la Familia v. Shrivers Otero, __ P.R. Dec. __, 98 JTS 46, 828 (P.R. 1998), was a custody action over four children that the Department of Family had removed from their biological mother (pursuant to a court proceeding), based on the mother's drug addiction. *Id.* at 829. In 1995, based on a stipulated finding that the biological mother had recovered from her drug addiction, the lower court granted her custody of all four children. *Id.* at 830. While the mother eventually gained custody of *two* of the children, the foster parents of the other two children objected to the court's granting of custody. *Id.* Based on the foster parents' objections, the lower court held an evidentiary hearing and granted custody to the biological mother. *Id.* The foster families appealed the trial court's decision to the Circuit Court of Appeals. *Id.* The Circuit Court of Appeals issued an order that the matter be remanded to family court, where the foster parents would be allowed to petition for custody, but failed to discuss the legal issues raised in the appeal.

The Supreme Court ruled that the decision of the Circuit Court of Appeals violated Rule 10(A). It ruled that:

> The appellate forum did not consider the issues that were presented to it, but rather annulled de facto the custody proceeding . . . without considering its correctness and validity . . . [Accordingly,] the appellate forum did not examine in all [their] breadth [the issues of law and fact in the appeal before it].

Id. at 832-33. In its decision, the Supreme Court emphasized that Rule 10(A) was intended to protect citizens' fundamental right to a fair and complete adjudication of their rights, which is central to notions of due process. "[To ensure that justice has been achieved,] it is necessary that the Circuit Court [of Appeals] consider the matters that are brought before it with

legal precision and a great sense of justice." *Id.* at 832. The role of Rule 10(A) in guaranteeing due process has been also recognized by at least one prominent commentator on Puerto Rico legal procedure:

> The Circuit Court of Appeals shall resolve on the merits, not by means of a simple "denied," and in writing, the appeals and the writs that are before it for consideration. Its decision must be based on a reasoned judgment that shall include a statement of facts, and an explanation and analysis of the issues raised.
>
> The intermediate Court is required to provide in all cases the reasons that *explain its rulings . . . The majesty of the law requires that the Panel always get to the bottom of the disputed issues in order re-establish balance and legality.* It is a right to have injustice put right. This is the case because [the Circuit Court of Appeals is not a court] of review with the objective of unifying jurisprudence. [Rather,] [i]t is an organ established to administer justice to the parties. . . . Through the appeal taken by the losing party, the *controversy shall be re-examined in all its breadth* (with respect to issues of both law and fact) by a Panel of the Circuit Court of Appeals.

Jose A. Cuevas Segarra, *Práctica Procesal Puertorriqueña – Práctica Apelativa* 23 (Luiggi Abraham ed., 2d ed. 1995) (emphasis added).

Here, the decision of the Circuit Court of Appeals did not meet the requirements of Rule 10(A). The Circuit Court of Appeals included *no* independent discussion or analysis of the legal issues involved in this case, wholly failing to address any of the many legal errors that Petitioner raised in

its appeals papers. *See supra* at 6. After restating the facts of the case, the court wrote as follows:

> After examining the appeals brief with the errors therein propounded, and after analyzing the bases which the Court of First Instance detailed to arrive at its conclusions, this Court accepts and adopts as its own such legal bases.

App. at 2a.

C. The Circuit Court's Violation of Rule 10(A) Also Constituted a Violation of Federal Due Process

The Fifth and Fourteenth Amendments to the United States Constitution provide that no person shall be deprived "of life, liberty, or property, without due process of law." Under the Fourteenth Amendment, this guarantee has been interpreted to comprise both a "procedural" and a "substantive" component. "The claim that a person is entitled to 'substantive due process' means . . . that state action which deprives him of life, liberty, or property must have a rational basis — that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as 'arbitrary.' " *Jeffries v. Turkey Run Consol. School Dist.*, 492 F.2d 1, 3-4 (7th Cir. 1974). Accordingly, a plaintiff must demonstrate a liberty or property interest, and that the state deprived the plaintiff of such an interest in an arbitrary and capricious manner. As a preliminary matter, it is clear that the due process guarantees of the United States Constitution apply to Puerto Rico. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974) (the due process guarantees of the United States Constitution apply to Puerto Rico because "[t]he Joint Resolution of Congress approving the Constitution of the Commonwealth of Puerto Rico, subjects its government to 'the applicable provisions of the Constitution of the United States,' and 'there cannot exist

under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States.' ") (citations omitted); *Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979) ("this Court has held or otherwise indicated that Puerto Rico is subject to the . . . Due Process Clause of either the Fifth or the Fourteenth Amendment"); *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 331 n.1 (1986) (same).[5]

The violation of Rule 10(A) by the Circuit Court of Appeals, by upholding the trial court's decision on liability, has deprived Petitioner of a property right protected by the due process protections of the United States Constitution, as set forth in the prior decisions of this Court. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan*, an employee, who was discharged on the basis that his short left leg made it impossible for him to perform his duties as a shipping clerk, filed a claim for unlawful termination under the Illinois Fair Employment Practices Act ("FEPA") with the Illinois Fair Employment Practices Commission. *Id.* at 426. Under FEPA, the Commission had 120 days to hold a hearing. *Id.* at 424. By apparent inadvertence, the Commission failed to schedule a hearing within the 120 days deadline. *Id.* at 426. The Illinois Supreme Court held that the Commission's failure to hold the hearing within 120 days deprived the Commission of jurisdiction to hear the charge, thereby effectively extinguishing his claim. *Id.* at 427-28. The Illinois Supreme Court also rejected the employee's claim that the Commission's failure to comply with the 120-day deadline in FEPA constituted a Fourteenth

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5. This case law demonstrates that the due process guarantees of the United States Constitution apply to Puerto Rico, a commonwealth, in the same way that they would apply to any of the states. Accordingly, for convenience, this petition refers only to states, which is meant to include the Commonwealth of Puerto Rico.

Amendment due process violation. *Id.* This Court ruled that appellant's right to use the FEPA's adjudicatory procedures is a species of property protected by Due Process. *Id.* at 428-31. The Court explained that:

> The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except "for cause." Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact."

Id. at 430 (citations omitted). *See also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311 (1950) (cause of action is a form of property protected by the United States Constitution's due process guarantees); *Martinez v. California*, 444 U.S. 277, 281-82 (1980) ("arguably," a state tort claim is a "species of 'property' protected by the Due Process Clause"); *Boddie*, 401 U.S. 371 (1971) (discussing the right of access to courts).

Logan recognized that state law procedures can create property interests protected by the United States Constitution. Here, Petitioner has a property interest in the procedure that Rule 10(A) has established for all Puerto Rico litigants, the right to a fully reasoned and explained appellate decision that addresses the full range of issues on appeal. Also, the trial court's decision, a decision of civil liability, necessarily deprived NYDS of property rights to the extent that the decision later forms the basis of a damages award to ARI and/or ERSI (assuming, of course, that ARI and/or ERSI can prove any damages).

In addition, the violation of Rule 10(A) by the Circuit Court of Appeals raises particularly important due process concerns because, as discussed *supra*, Rule 10(A) was specifically adopted by the Puerto Rico Supreme Court to

guarantee due process protections. Furthermore, although the right to an appeal is not guaranteed by the Constitution, a state that elects to provide a right to an appeal must make sure that the appeal complies with the requirements of federal due process. *Evitts v. Lucey*, 469 U.S. 387, 393, 400-01 (1985). *See also Pueblo v. Esquilín Díaz*, __ P.R. Dec. __, 98 JTS 139, 193, 1998 WL 740944 at *3 (P.R. 1998)[6] (holding that once the right to an appeal is guaranteed, deprivation of that right is a violation of due process) (citing *Pueblo v. Serbía*, 78 P.R. Dec. 788, 792 (P.R. 1955); Senate of Puerto Rico, Minority Report to House Project 382, 12th Legis. Assembly, 1st Ordinary Sess. at 15-16 (P.R. 1993) (same).

In sum, the failure of the Circuit Court of Appeals to comply with Rule 10(A) violated NYDS's due process rights under the United States Constitution, as follows. Under *Logan*, NYDS has a property interest in the procedure provided by Rule 10(A), the right to a reasoned explanation and analysis by the Circuit Court of Appeals. The failure of the Circuit Court of Appeals to follow this mandatory procedure of state law — designed to guarantee the due process rights of Puerto Rico litigants — deprived NYDS of its right to a reasoned explanation and analysis in an arbitrary and capricious manner, thereby violating NYDS's right to due process guaranteed by the United States Constitution.

II. THE LOWER COURTS ARE DIVIDED ON WHETHER VIOLATIONS OF STATE LAW OR PROCEDURE ALSO CONSTITUTE DUE PROCESS VIOLATIONS WHERE THEY DEPRIVE A CLAIMANT OF A PROTECTED INTEREST.

The Ninth and Tenth Circuits have held that a state actor's failure to follow state law or procedures constitutes a

6. The Puerto Rico Supreme Court requires that all its decisions reported in electronic format bear the citation to the reporter known as "Tribunal Supremo de Puerto Rico" ("TSPR"). The citation for this decision is 98 TSPR 138.

violation of substantive due process under the United States Constitution where it deprives a party of a property right. In *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976), the plaintiff was a former instructor at a state university who claimed that a state university had failed to renew her teaching contract, in violation of the university's tenure policy. *Id.* at 245. The court found that the instructor had a property right protected by federal due process because she had "de facto tenure" with the university. *Id.* at 249. The court then examined whether the state's actions, which deprived her of her property right in tenure, were arbitrary and capricious under the Fourteenth Amendment. In so doing, the court held that "the College bore the burden of proving that there was" a rational basis for its decision. *Id.* at 249. There, the university claimed that financial exigency required the dismissal. The court in *Bignall* found that the university's claim that financial exigency required the dismissal was supported by the evidence and constituted a rational basis. *Id.* at 249-50.

The facts involved in the Tenth Circuit's decision in *Brenna v. Southern Colorado State College*, 589 F.2d 475 (10th Cir. 1978), are similar to those of *Bignall*. In *Brenna*, a tenured professor was terminated because of budgetary exigencies. She was chosen to be dismissed even though a non-tenured faculty member in her department was retained. *Id.* at 476. She claimed that her dismissal violated an implied condition in her school's tenure policy "that nontenured faculty must be terminated before tenured [faculty] if there is work which the tenured faculty member is capable of performing." *Id.* at 477. Like the Ninth Circuit in *Bignall*, the Tenth Circuit looked to whether the school's dismissal violated the professor's Fourteenth Amendment due process rights. In the end, the court found no due process violation, holding that the school's termination was in compliance with its tenure policy, which permitted termination of tenured

faculty for budgetary reasons, and which made no provisions for selecting faculty to be terminated. *Id.*[7]

The decisions of the Ninth and Tenth Circuits in *Brenna* and *Bignall* directly conflict with decisions of the Fifth and Sixth Circuits. In *Levitt v. University of Texas at El Paso*, 759 F.2d 1224 (5th Cir. 1985), the plaintiff was a tenured state university professor who was dismissed because of allegations of sexual harassment. *Id.* at 1226. The professor claimed that the university had violated his substantive due process rights because the committee that recommended his dismissal was formed in violation of applicable university

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7. The decisions in *Bignall* and *Brenna* are consistent with this Court's decision in *Hicks v. Oklahoma*, 447 U.S. 343 (1980). In *Hicks*, a criminal defendant was sentenced by a jury to forty years for unlawfully distributing heroin. *Id.* at 344-45. The jury instructions were based on and referred to a state habitual offender statute which was later declared unconstitutional. *Id.* at 345. Had the jury been correctly instructed, it could have imposed any sentence not less than ten years. *Id.* at 345-46. This Court ruled that the defendant's rights under the state procedural statute at issue were also subject to the substantive due process protections of the Fourteenth Amendment. *Id.* at 346.

> It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id.

procedures. *Id.* at 1227. The court rejected this argument, writing that:

> We recognize that the Tenth Circuit in *Brenna* and the Ninth Circuit in *Bignall* held that where a property interest is taken in accordance with constitutional procedural due process there may nevertheless be a denial of substantive due process if, in taking the property interest, the state refuses to follow additional procedural protections it has promised to afford. We decline to adopt that approach, however, for both logic and precedent counsel against our using the substantive protections of the due process clause to constitutionalize what is otherwise purely a question of state law.

Id. at 1231.

The court went on to write: "All the University has deprived him of, if it has indeed failed to follow its own rules, is his right to have those particular rules followed . . . [, which] certainly does not rise to the level of a property or liberty interest protectible by the Constitution." *Id.* at 1231. Even the court in *Levitt*, however, indicated that, in spite of its ruling: "That is not to say that a state can never deprive its citizens of substantive due process by violating its own laws, but we reject Levitt's claim that a state's failure to follow its own rules is a per se deprivation of substantive due process." *Id.* at 1233.[8]

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8. The court's holding in *Levitt* is consistent with other decisions of the Fifth Circuit. For example, *Smith v. City of Picayune*, 795 F.2d 482 (5th Cir. 1986), was a case involving zoning regulations. There, the plaintiffs were land developers who claimed that the city of Picayune, Mississippi, violated Mississippi law by zoning land

(Cont'd)

The Sixth Circuit has endorsed the same rule as the Fifth Circuit. In *Purisch v. Tennessee Technological University*, 76 F.3d 1414 (6th Cir. 1996), a state university professor challenged his denial of tenure on grounds of, *inter alia*, deprivation of substantive due process under the Fourteenth Amendment. *Id.* at 1418-19. Specifically, the plaintiff claimed that university officials failed to follow the school's

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(Cont'd)
adjacent to their residential developments for multi-family residential use. *Id.* at 483. The court found that the city had, in fact, violated Mississippi law. *Id.* at 487. However, notwithstanding this violation, the court rejected the plaintiff's argument that "the City's failure to follow the procedure set forth in its own ordinance and required by state law was per se arbitrary and irrational and, as such, a violation of substantive due process." *Id.* at 488. In support of its holding, the court cited another Fifth Circuit decision, *Stern v. Tarrant County Hospital Dist.*, as follows:

> The guarantees of the fourteenth amendment, . . . its promise of protection from arbitrary or irrational state action, are guarantees that turn on federal constitutional standards of . . . rationality rather than on state standards. Converting alleged violations of state law into federal . . . due process claims improperly bootstraps state law into the Constitution.

795 F.2d at 488 (quoting *Stern*, 778 F.2d 1052, 1056 (5th Cir. 1985)). *See also Woodard v. Los Fresnos Indep. School Dist.*, 732 F.2d 1243, 1244 (5th Cir. 1984) ("Every deviation from a state agency regulation does not constitute a denial of due process."); *Brown v. Texas A&M Univ.*, 804 F.2d 327, 334 (5th Cir. 1986) ("The failure of a state agency to comply with its internal regulations is insufficient as a matter of law to establish a violation of Due Process"); *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994) ("A state's failure to follow its own procedural regulations does not constitute a violation of due process"); *Franceski v. Plaquemines Parish School Bd.*, 772 F.2d 197, 200 (5th Cir. 1985) (state school system's failure to follow state law in teacher's dismissal hearing not a violation of substantive due process).

grievance procedure in reviewing his denial of tenure. *Id.* at 1419. The court held that this specific claim did not implicate substantive due process protections under the Fourteenth Amendment, holding that "[v]iolation of a state's formal procedure, however, does not in and of itself implicate constitutional due process concerns." *Id.* at 1423. *See also Levine v. Torvik*, 986 F.2d 1506, 1515 (6th Cir. 1993), *cert. denied*, 509 U.S. 907 (1993) ("A state cannot be said to have a federal due process obligation to follow all of its procedures; such a system would result in the constitutionalizing of every state rule, and would not be administrable.").

III. THE CONFLICT OF AUTHORITY RAISES BROAD FEDERALISM CONCERNS.

This petition raises questions that have broad implications for the relationship between the state and federal governments. Whether a state's grant of procedural rights vests a citizen with protections under the United States Constitution is an issue that strikes at the heart of this relationship. This Court has consistently taken an active role in monitoring and maintaining this relationship, and, as the final arbiter of the scope of the United States Constitution, is uniquely well-positioned to do so. *See Vitek v. Jones*, 445 U.S. 480, 490-491 n.6 (1980) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974)); *Logan*, 455 U.S. at 432 (citing *Vitek*). This petition provides an opportunity for the Court to clearly demarcate the relationship between state procedural rights and federal due process guarantees. Also on a practical level, a decision by this Court on the issues raised in this petition will affect a citizen's ability to bring into federal court claims that arise from violations of state procedures. As such, it will affect not just litigants in Puerto Rico, but also throughout the United States.

This Court has long recognized that the due process guarantees of the Constitution are fundamental to the American system of government, and that they reflect values that are as "old as a principle of civilized government." *Munn v. Illinois*, 94 U.S. 113, 123 (1876). *See also Southwestern Oil Co. v. Texas*, 217 U.S. 114 (1910). Those protections apply both to actions by the federal and state governments. For that reason, the Fourteenth Amendment specifically imposed upon the states the obligation to ensure that their actions do not infringe due process. Also, it is well-established that one of the purposes of the federal constitution's due process guarantees is to protect persons from abuses of power by all governments, including those of the *states*. *See Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("[T]he Bill of Rights in general, and the Due Process Clause in particular . . . were designed to protect the fragile valuables of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 646-47 (1974). Furthermore, these protections apply to actions that violate federal due process, even if those actions *also* constitute violations of state law or procedure. Nothing in the text of the Constitution carves out from its protections violations of due process that are also state law violations. Furthermore, the Constitution does not narrowly proscribe the form that violations of federal due process can take. In fact, as this Court has recognized many times, " 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (discussing procedural due process); *see also Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961) (same); *Mathews v. Eldrige*, 424 U.S. 319, 334-35 (1976) (same).

The rulings of the Ninth and Tenth Circuits, recognizing that violations of state laws and procedures can constitute federal due process violations, are consistent with the due process jurisprudence of this Court, as discussed above. This Court should grant this petition and reject the contrary rulings of the Fifth and Sixth Circuits as inconsistent with the United States Constitution's due process guarantees.

IV. THE DECISION OF THE PUERTO RICO SUPREME COURT IS FINAL.

Section 1258 provides that this Court may review by petition of certiorari "final judgments or decrees." There is little case law construing the term "final judgment" under Section 1258. However, there is a well-developed body of case law construing the same term under 28 U.S.C. § 1257, an analogous statute that provides for appeals of decisions by the highest courts of the states. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In *Cox Broadcasting*, this Court recognized that a strict interpretation of the finality requirement of Section 1257 would "preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.' " *Id.* at 477 (*quoting Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). However, this Court went on to articulate certain categories which constitute exceptions to this strict interpretation. The Court considers cases falling within any of these exceptions as final, despite the fact that all related state court proceedings have not been completed. *Id.* The second *Cox Broadcasting* category consists of those cases where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. The third *Cox Broadcasting* category consists of:

> those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.

Id. at 481. This case falls within the exceptions described in both the second and third *Cox Broadcasting* categories, for the following reasons.

In 1998, NYDS filed its appeal of the trial court's decision with the Circuit Court of Appeals. At that time, both ARI and ERSI challenged the appeal on the ground, *inter alia*, that the trial court's decision was not final. To support their challenge, ARI and ERSI pointed to the fact that the trial court had bifurcated the proceeding into separate liability and damages phases, and that the damages phase had yet to take place. Rejecting their challenge, the Circuit Court of Appeals elected to hear NYDS's appeal, implicitly ruling that the trial court's decision on liability was a final decision.

Because the Circuit Court of Appeals has ruled that the liability decision is final, NYDS will be unable to raise its due process arguments during the damages phase. Once the trial court begins the damages phase, it will not be able under Puerto Rico law to consider issues that bear on the issue of liability, including the due process arguments raised in this petition. Because the trial court will be unable to consider the due process claims involved in this petition during the damages phase, they will survive and require adjudication by this Forum after the damages phase has ended, thus meeting the requirements of the second *Cox Broadcasting* category. Also, in the framework of the third *Cox Broadcasting* category, there are "further proceedings on the merits in the state courts to come, but . . . later review of the

federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481.

That the decision of the Puerto Rico Supreme Court is final is confirmed by case law of the First Circuit. Before the adoption of Section 1258, "final decisions" of the Puerto Rico Supreme Court were reviewed by the First Circuit. During that period, it was well-established in the First Circuit that a denial of certiorari by the Supreme Court of Puerto Rico was a "final decision" for purposes of appeal. *See, e.g., Int'l Basic Econ. Corp. v. Blanco Lugo*, 267 F.2d 263, 265 (1st Cir. 1959) (denial of petition of certiorari "by the Supreme Court of Puerto Rico is a 'final decision' appealable to" the First Circuit). Similarly, the First Circuit, in *Rupert Hermanos, Inc. v. People of Puerto Rico*, 118 F.2d 752 (1st Cir. 1941), allowed the appeal of an order appointing a receiver. *Id.* There, the court held that:

> A "final decision" is not necessarily the ultimate judgment or decree completely closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particular phases of the litigation, reserving other matters for future determination. The words "final decisions," like the equivalent "final judgments and decrees" in former acts regulating appellate jurisdiction, have not been understood in a strict and technical sense, but have been given a liberal and reasonable construction.

Id. (citations omitted).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

DECISION OF THE SUPREME COURT OF PUERTO RICO, DATED MAY 14, 1999

IN THE SUPREME COURT OF PUERTO RICO

NO. CC-99-210
CERTIORARI

Almacenes Rodriguez, Inc. and
E. Rodriguez & Sons, Inc.

Plaintiffs-Respondents

v.

New York Department Stores de Puerto Rico

Defendant-Petitioner

RESOLUTION

San Juan, Puerto Rico, May 14, 1999

The petition of certiorari filed by defendant-petitioner is denied.

The Court so agreed and the Supreme Court Clerk so certifies. Associate Judge Rebollo López would issue the writ. Associate Judge Negrón García disqualified himself. Associate Judges Mrs. Naveira de Rodón and Mr. Fuster Berlingeri did not participate.

(signed)
Isabel Llompart Zeno
Supreme Court Clerk

APPENDIX B

DECISION OF THE CIRCUIT COURT OF APPEALS, SAN JUAN REGIONAL CIRCUIT, DATED SEPTEMBER 23, 1998

COMMONWEALTH OF PUERTO RICO
IN THE CIRCUIT COURT OF APPEALS
SAN JUAN REGIONAL CIRCUIT

KLAN9700081

ALMACENES RODRIGUEZ, INC. AND
E. RODRIGUEZ & SONS, INC.

Appellees

v.

NEW YORK DEPARTMENT STORES
DE PUERTO RICO, INC.

Appellant

Panel composed by its president, Judge Fiol Matta, Judge Rodriguez de Oronoz and Judge Gierbolini.

JUDGMENT

In San Juan, Puerto Rico, on September 23, 1998.

On appeal we are petitioned to reverse the Partial Judgment issued by the Court of First Instance, San Juan Superior Division, on December 23, 1996, of which a copy was filed in the docket the 27th of December of the same

year. Through such opinion, the court resolved that the concession agreement ("contrato de concesión") agreed between Almacenes Rodriguez, Inc. (henceforth ARI) with the New York Department Stores (henceforth NYDS) was perfect and valid and that the latter did not comply with certain clause in the same (case KLAN9700081).

Subsequently, on January 29th, 1997, the Court of First Instance issued a Resolution in which it considered the memorandum of costs and expenses that ARI had presented. Through such resolution, it condemned NYDS to pay costs amounting to $22,450.30. In a timely fashion, NYDS petitioned for Reconsideration of such resolution. The Court of First Instance considered the same and reduced the item to be paid on account of costs to the sum of $15,000.00. From such a resolution issued in reconsideration, NYDS comes before us through a writ of certiorari (case KLCE9700328).

Through a resolution we issued on May 19, 1997, notified on June 4th following, we decided to consolidate both proceedings and to solve the controversies they entail in a joint fashion.

After analyzing the files with their respective briefs and appendixes, and for the basis we expound henceforth, **WE CONFIRM** both, that is, the appealed Judgment as well as the Resolution whose revision is sought.

– I –

Almacenes Rodriguez, Inc. and E. Rodriguez & Sons, Inc. (henceforth ERSI) are the owners of the stores popularly

known as Almacenes Rodriguez. Mr. Emilio Rodriguez Nigaglioni is the only owner and stockholder of both corporations. Of the evidence presented before the Court of First Instance, it emerges that in practice both juridical entities function in a concerted fashion and as one sole organization. Aside from the other facts that show this is so, in particular, attention is given that when the facts that are the subject of this controversy arise, ARI and ERSI used one sole operational account that obtained its funds from the individual accounts of both.

NYDS is a chain of department stores that, after some financial and marketing considerations, decided to grant the operation of several departments in their stores to specialized concessionaires, including shoes. After considering several candidates, the negotiations were undertaken with ARI.

Once the negotiations started, ARI conditioned its interest in the departments to the contract that would be executed be one of long duration, that it not be imposed the payment of a fixed rent and that it be provided protection in case that the stores were sold.

In the drafts studied by the parties, NYDS granted to ARI the protection and conditions that it requested in order to enter into a contract. The last one of these drafts were sent by NYDS to ARI on or about May or June of 1993. The draft included the initials and the signature of the president of NYDS. The effective date of the contract was indicated in the document. ARI did not react to this draft until September of that year. Meanwhile, the parties agreed to begin the operations while the negotiations were culminated

and the required contract was subscribed. By August of 1993, ARI had established 5 of the 10 stipulated departments.

On August 18, 1993, the vice-president of NYDS, Mr. Zapata, asked Mr. Emilio Rodriguez to return the signed contract, among other matters. On September 1, 1993, before ARI returned the signed contract, then president of NYDS, Mr. Irelan, sent to Mr. Rodriguez a letter in which he communicated that the contract would not be approved if NYDS was not reserved the power to cancel the contract in case that the stores or the stock were sold, in addition to the fact that the contract had to be approved by the Board of Directors of NYDS. This was the first time in the negotiations that NYDS required the approval of the contract by such board.

Mr. Rodriguez returned the signed contract and informed to Mr. Irelan that the proposed amendment was contrary to what had been agreed to. This letter was not answered by NYDS. Afterwards, NYDS offered on several occasions to amend the contract through an "Addendum." At all times ARI showed opposition to the proposed amendments, including through a letter of March 4, 1994.

That letter was answered by Mr. Irelan expressing his disagreement on account of Mr. Rodriguez's refusal and threatening to take retaliatory actions, impeding the opening of additional departments, and also of relocating the existing ones. ARI replied that, even though it preferred that the proceeding were undertaken in a cordial manner, if it were necessary, it would go to the courts.

Appendix B

Of the subsequent communications between both parties it comes forth that they acted under the belief that they were joined by a contractual relation. Therefore, by letter of June 7, 1993, Mr. Zapata circulated a memorandum to the NYDS managers in which he informed them that they had formalized "contract with Almacenes Rodriguez to operate the shoe department" in the stores.

About the same month, a certain official of the NYDS met with her corresponding official at ARI to establish the necessary administrative procedures for the operation of the concession. On June 18, 1993 NYDS circulated two memoranda where they detailed the administrative procedures that would rule the integration of the ARI shoe departments to the NYDS operations. It is the lower court Judge's estimation that from both memoranda it comes forth that ARI is the concessionaire of the shoe department and that the detailed administrative procedures come from the contract between both corporations.

Two months later, on August 18, 1993, Mr. Zapata requested from ARI that the signed contract be returned and that evidence be submitted that they had complied with clause 12 of the contract, which obligated them to maintain NYDS as an additional insured in their public liability insurance policy.

In the meantime, NYDS began negotiations for the sale of their stores. In such negotiations they informed to the buyers that a contract existed with ARI that had not been breached by any of the parties and that they were interested that when the sale were finalized, the concession contract

be honored. The buyers were not in agreement because they understood that their stores followed a different concept.

The NYDS executives informed those of ARI that their stores would be sold and they made an offer of compensation for the premature cancellation of the contract.

The NYDS liquidation sale took place from May to July of 1994. ARI participated in the liquidation sale and upon its completion it abandoned the locations. On November of the same year some of the NYDS stores reopened under the name of Marshalls.

On June 14, 1994 ARI sued NYDS for breach of contract. The complaining party alleged that the defendant breached the concession contract. For its part, NYDS denied the existence of the contract and pointed out that the operation by ARI of the departments was as a result of an arrangement or accommodation, and not under a contract. In the alternative, they alleged that the acts of the president and vice-president did not obligate them if they had not been approved by the Board of Directors and that the Board of Directors did not approve the contract. On the other hand, they alleged that, if there was a contract, ARI could not claim for its breach because it also breached it by assigning it to ERSI.

After several procedural actions that included the Court of First Instance's determination to divide the case into two phases, discovery of evidence commenced and then trial was held.

Appendix B

– II –

After examining the appeals brief with the errors therein propounded, and after analyzing the bases which the Court of First Instance detailed to arrive at its conclusions, this Court accepts and adopts as its own such legal bases. Pursuant to the same, it **CONFIRMS** the Partial Judgment which has been appealed.

– III –

In regards to the Resolution which grants $15,000.00 for the concept of costs in favor of the prevailing party, the petitioning party has not shown that the Court of First Instance was unreasonable or, that in any other way, incurred in an abuse of its discretion. Therefore, and being the decision of the appealed court worthy of our deference in terms of the presumption of reasonability that its decisions entail, we understand that it is proper to **ISSUE** the writ and also **CONFIRM** the Resolution we have reviewed.

Agreed to and ordered by the Court and certified by the Secretary General.

[Signed: Gladys E. Ortega Ramírez]
Undersecretary General
Aida Ileana Oquendo Graulau
Secretary General

APPENDIX C

DECISION OF THE COURT OF FIRST INSTANCE, SAN JUAN SUPERIOR PART, DATED DECEMBER 23, 1996

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SAN JUAN SUPERIOR PART

CIVIL NO. KPE94-0345
(803)

RE: BREACH OF CONTRACT DAMAGES

ALMACENES RODRÍGUEZ, INC. and
E. RODRÍGUEZ & SONS, INC.,

Plaintiffs,

v.

NEW YORK DEPARTMENT STORES
DE PUERTO RICO, INC.,

Defendant.

STATEMENT OF CASE, FINDINGS OF FACTS, CONCLUSIONS OF LAW AND PARTIAL JUDGMENT

STATEMENT OF CASE

In the complaint which is the object of this case, plaintiff party alleges that defendant party violated the terms and

conditions of a license agreement to operate shoe departments in ten stores of codefendant New York Department Stores (NYDS hereinafter), executed on May 19, 1993.

The alleged violation has to do with the fact that the duration of the agreement was established at 15 years, divided into three consecutive terms of five years each, all renewable at the exclusive option of plaintiff party, and that NYDS unilaterally canceled it at the end of the first year of operations, when there were still 14 years left. They contend that the cancellation was due to the decision of the owners of NYDS to sell their stores to the Marshalls, Inc. firm (Marshalls hereinafter), in violation of clause 22 of the agreement, which imposed on them the obligation of seeing to it that Marshalls respect the agreement and continue with Almacenes Rodríguez, Inc. (ARI hereinafter) as licensee.

By reason of the breach, it claims a substantial sum as loss of fruits.

On its part, NYDS denies the existence of the agreement and, although it admits that ARI operated the shoe departments, contends that it allowed it as an accommodation, but without an agreement. It further asserts that, in any event, the actions and conduct of the President and of the Vice-President of NYDS in charge of finance during the negotiation do not bind it, because they were not authorized by its Board of Directors; that the Board did not approve the agreement and that, anyway, in the event that it were determined that an agreement exists, ARI has no right to claim, because it breached it upon assigning it to E. Rodríguez & Sons, Inc. (ERSI hereinafter), thus violating

clause 20 of the agreement, which prohibits the assignment of its rights without the consent of NYDS.

The original complaint was filed on June 14, 1994 and NYDS answered it on August 11. It was amended on October 6, 1995 to include ERSI as an additional plaintiff, alleging that it has an interest in the matter because it shares a close community of interests with ARI and that, therefore, it has an interest in the license agreement. They alleged, in the alternative, that if there was no agreement, then defendant party at the least incurred wrongful conduct upon terminating the business relationship between the parties, having already generated in the mind of ARI the reasonable certainty that an agreement existed and that its tenure in the departments was insured for the term covenanted, and that, therefore, it is liable to plaintiff party for the damages that its negligent actions caused it. NYDS answered the amended complaint on December 6, 1995.

Through a brief on October 13, 1995, NYDS opposed the amendment requested, basically contending that the amendments proposed were not susceptible of being dated back to the time of filing of the original complaint, wherefore the new causes of action were barred by the statute of limitations. The Court, through an order of November 10, 1995, allowed the amendment, postponing until later the decision on the issue of the statute of limitations.

After the pleadings had been interposed by the parties, NYDS presented a motion for summary judgment on the ground that, assuming **arguendo** that an agreement existed, the complaint had to be dismissed because ARI had breached

the terms thereof upon assigning it to ERSI. In opposition to the motion, ARI admitted that the agreement was unassignable but argued that ARI and ERSI were the same thing, wherefore no assignment had taken place. The Court, without prejudging the merits of the issues raised by NYDS, denied the motion because it understood that controversies existed involving material facts.

The Court held several pre-trial conferences and other meetings. After evaluating the allegations and defenses, and taking into consideration the cumulus of evidence that would be presented, the Court decided that it would be most convenient to fraction the case into two phases. The liability of NYDS, if any, would be elucidated during the first one and the amount of damages would be determined during the other.

The parties used the discovery mechanisms, after which the trial in the first phase was held on the dates of February 5 to 8, 1996, April 22 to 25, 1996 and June 18 and 19, 1996.

At the hearing on the merits, ARI and ERSI presented abundant testimonial evidence, which consisted of the testimony of Messrs. Emilio Rodríguez Jarabo, President of ARI and of E. Rodríguez; Tomás Rodríguez Jarabor, Vice-President of ARI and E. Rodríguez; Ramón Ramos Peterson, Accounting Supervisor for ARI and E. Rodríguez; and Manuel Garrido, Managing Partner of Deloitte & Touche, External Auditor and expert for plaintiff party. It also offered abundant documentary evidence, which was marked and admitted.

Appendix C

When plaintiff party concluded its presentation of evidence, NYDS presented a motion for dismissal, regarding which the Court reserved its decision and ordered that defendant party present its evidence.

In consequence, NYDS proceeded to present evidence, which consisted of the testimony of Messrs. Glen Irelan, President and Chief Executive Officer of NYDS as of the date on which the events took place; William Zapata, Vice-President and Chief Financial Officer of NYDS as of the date on which the events took place and who currently continues to serve it as a consultant; Glenn Dell, member of the Board of Directors of NYDS as of the date on which the events took place; Socorro Fontanes, Executive in the NYDS Accounting Department; Ramón Acevedo Sevilla, former employee of the Accounting Department at ARI and E. Rodríguez; Eduardo Franklin, Esq., attorney for ARI; and, CPA Rafael Martínez Margarida, Managing Partner of Price Waterhouse & Co., as an expert. Said party also submitted voluminous documentary evidence, which was marked and admitted.

Having analyzed and evaluated the aggregate of evidence offered by the parties, settled the conflicts in the evidence, adjudicated the credibility that we deemed the witnesses and experts to have, considered the memorandums of law submitted by the parties, the Court formulates the following:

FINDINGS OF FACTS

1. ARI and ERSI are corporations that do business and are organized in accordance with the Laws of the

Commonwealth of Puerto Rico, and are engaged in the retail sale of purses and shoes.

2. ARI and ERSI are the owners of "Almacenes Rodríguez," trade name used to designate a business that for years has been operating in Puerto Rico a chain of stores engaged in the sale of purses and shoes. Each one of said corporations operates a group of stores, of which there are 26 in all.

3. Don Emilio Rodríguez Nigaglioni is the sole owner and stockholder of both corporations. Although they keep separate account books, bank accounts, payrolls and accounting records and individually file income tax, personal property, municipal patent returns and reports to the Department of State, in practice they really operate as a single organization, known to and identified by the public and business community in Puerto Rico under the commercial name of "Almacenes Rodríguez." Both corporations have and share the same corporate directors and officers; have their main offices located in the same place at Ponce de León Avenue in Santurce; carry out transactions between themselves without one deriving benefits over the other. That is to say, they do not do business between themselves at arm's length. They issue a single, combined financial statement, share the same firm of external auditors and, in general, present themselves before the public and the business community as "Almacenes Rodríguez."

4. Mr. Emilio Rodríguez Nigaglioni was, in turn, the sole stockholder of a number of other corporations which back in the year 1985 merged with ERSI, which was the

surviving corporation. ARI was not a part of the merger, for which reason it has continued its operations from 1946 to the present.

5. ERSI pays the salaries of the employees who work both in the main offices and in the warehouse. Since all of those employees perform work that benefits both corporations, at the end of each fiscal year the management makes some adjustments of the expenses of the main offices and warehouse, to distribute between the corporations the proportional expenses that each corporation incurs in the maintenance and operation of the main offices and of the warehouse.

6. In addition to the accounts that each corporation has by stores, for many years both ARI and ERSI kept, each one separately, an operating account to which they transferred the proceeds from the sales of the stores that each one of them operated and against which they drew the checks to pay for the operating expenses of each one of them.

7. Beginning in approximately the year 1992, both corporations began to use a single operating account which was nourished from the transfer of funds deposited to the individual accounts that each one of the corporations continued to keep, wherein the proceeds from the sales of each one of its stores were deposited. However, those transfers were recorded in the books of each one of the corporations, so that the Accounting Department knew at all times how much from the money deposited to the operating account belonged to ARI and how much was ERSI's.

Appendix C

8. NYDS is a corporation organized and doing business in accordance with the laws of the Commonwealth of Puerto Rico and it is engaged in the retail sale of general merchandise in its different full-line department stores.

9. Mr. Glenn Irelan performed as President of NYDS from October 1991 to July 26, 1994.

10. Mr. William Zapata performed as Vice-President and Chief Financial Officer of NYDS from February 1st, 1992 to August 1st, 1994.

11. Back at the end of the year 1992, the management of NYDS and its Board of Directors made the decision of putting in place a number of measures to make the operations more profitable, which included eliminating several departments, consolidating others and contracting with other companies for the operation of certain departments.

At the time, NYDS had been incurring operating losses as the result of a significant decrease in the sales volume. The study conducted showed that the operation of the shoe departments that the stores had was losing money and that it would be more beneficial to put it in the hands of someone with experience in the field.

12. With the aim of turning around their stores and making them profitable, NYDS implemented an ambitious remodeling plan intended to enhance their image, attract clientele and recapture sales. Among other things, and as part of a new strategy, its President and Chief Executive Officer, Mr. Glenn Irelan, recommended to the Board of

Directors that it grant the operation of several departments (furniture, appliances, records and shoes) to experienced licensees. The Board reacted favorably to this recommendation, approved the concept and charged Mr. Irelan with the effort to get suitable licensees.[1]

13. Messrs. Irelan and Zapata considered several candidates, to whom they offered the shoe department. Of these, ARI was the most interested one. On its part, NYDS had also become interested in Almacenes Rodríguez, since it knew about and was familiar with said stores throughout all of Puerto Rico, the type of merchandise that they offered and, in general, with the organization behind their operations.[2]

14. That being the state of things, at the end of 1992 or beginning of 1993, NYDS offered to ARI the operation as licensee of the shoe departments in ten of its stores. From the outset, ARI expressed concern about being left out of

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1. After the pertinent negotiations, the licenses for the furniture, appliance and record departments were granted to BWAC International and Distribuidora Aponte, respectively.

2. Years before, the NYDS had proposed the same deal to ARI on two separate occasions, one in 1986 and the other in 1989. Negotiations back then were not successful when the parties failed to agree, mainly regarding the rental that Almacenes Rodríguez would pay NYDS and regarding the duration of the agreement. The impasse arose from NYDS's understanding that it should charge a fixed minimum rent, irrespective of shoe sales, and it did not want to execute a long-term agreement. Almacenes Rodríguez was not interested in committing itself that way. Therefore, it rejected NYDS's proposal on those two occasions.

the business if the NYDS stores were sold to another operator. It knew that to be successful it had to make a substantial investment in the departments and wanted, therefore, to insure that it would have sufficient time to recover it. Furthermore, it knew that Investcorp, the entity that represented the stockholders of NYDS, was engaged in the business of buying financially troubled concerns to make them solvent and then sell them at a profit. Therefore, it did not want to run the risk of being left out of the business, especially without having recovered its investment or after having established a successful operation. The President, Mr. Irelan, assured Almacenes Rodríguez that his intent was to make the company profitable and continue as President, even if the stores were sold to another operator.

15. From the start of the negotiations, Almacenes Rodríguez conditioned its interest in the departments to it being granted a long-term agreement, to the non-imposition of a minimum fixed rent upon it, and to it being afforded protection in the event that the stores were sold. Mr. Irelan assured it that there would not be any problems.

16. With these understandings, the negotiations followed their normal course, with a program of visits to NYDS stores by executives from Almacenes Rodríguez taking place to show them the facilities of the departments.

17. At the middle or end of March 1993, NYDS prepared and submitted to ARI a proposed license agreement which contained a termination clause in the event of the sale of the stores and/or stock of NYDS.

Appendix C

18. In April 1993, Messrs. Emilio and Tomás Rodríguez Jarabo, President and Vice-President of ARI, respectively, met with Messrs. Glen Irelan and William Zapata to discuss and negotiate the terms of the agreement. At the time, in addition to being the highest-ranking corporate officers in NYDS, Irelan and Zapata were also members of its Board of Directors, which consisted of five directors. The other three were Messrs. Glenn Dell, David Crossland and Robert Glasser.

19. Clause 22 of that draft authorized NYDS to cancel the agreement before its expiration if its stores were sold to a third party. There is no controversy as to ARI asking that its text be amended to offer it protection, with the aim that the agreement not be canceled if NYDS were to be sold.

20. The parties met again in the middle of the month of May 1993, at which time the Rodríguez brothers requested additional amendments and modifications, requesting additional "protection" with respect to the modified termination clause, as well as with respect to the proposed opening date of the shoe departments in the NYDS stores and as to the type and cost of purses that could be sold in the departments, among other things. As a result of the meeting, NYDS submitted to ARI a lease agreement dated May 19, 1993, with the initials and signature of its President, Mr. Irelan.

21. This third draft modified clause 22, offering ARI the protection that it sought, since it imposed on NYDS the obligation of making the agreement binding on anyone who purchased its business. However, the document required

additional changes and modifications about other aspects. In consequence, its text had to be revised again.

22. NYDS revised the agreement and, at the end of May or beginning of June 1993, returned it to ARI with the initials and signature of its President. The agreement maintained an effective date of May 19, 1993. With respect to this agreement, ARI did not react until the month of September 1993.

23. By that time, NYDS had a special interest in completing the negotiations because they wanted to have the shoe departments begin operations as soon as possible, and ARI was also interested in beginning sales because, among other reasons, they wanted to take advantage of the Father's Day sales. Moved by that mutual interest and with the aim of advancing negotiations, Mr. Irelan authorized ARI to begin sales operations in some of its stores while negotiations were completed and the required agreement was signed. Operations began at the end of May or beginning of June 1993 at the Ponce store of the NYDS. One week later, ARI opened stores in the Mayaguez Mall.

24. On June 7, 1993, Mr. William Zapata, Vice-President and Chief Financial Officer of NYDS, circulated a memorandum addressed to the NYDS store managers informing them that ". . . (w)e have recently formalized an agreement with Almacenes Rodríguez to operate the shoe department in your stores . . ." Plaintiff Party's Exhibit 6.

25. At the beginning of June 1993, Mrs. Socorro Fontánez, officer of the Accounting Department of NYDS,

and Mr. Ramón Ramos Peterson, Accounting Supervisor for ARI, met to establish the administrative procedures required for the operation of the concession.

26. On June 18, 1993, Mrs. Fontánez circulated two memorandums with copy of the administrative procedures that were adopted for use by the main office and the stores, in order to integrate the operation of the shoe department with other NYDS departments. The reading of both documents shows that to NYDS, ARI was the licensee of the department, and that said procedures were based on the basic terms of the license agreement. These procedures, which were originally drafted in Spanish, were subsequently translated into English and went on to become a part of the firm's procedures' manual. Plaintiff Party's Exhibits 7, 8 and 45.

27. By August 1993, ARI had already established five of the ten shoe departments stipulated in the agreement.

28. On or around August 18, 1993, Mr. William Zapata wrote to Mr. Emilio Rodríguez Jarabo asking him to return the agreement signed and that he provide him with evidence of having complied with clause 12 thereof, which bound ARI to furnish proof of having NYDS as an additional insured in its public liability insurance policy, and to provide a hold harmless agreement in favor of NYDS.[3]

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3. The Court infers, from the aggregate totality of the evidence, that ARI in effect complied with these two requirements, since NYDS did not allege that ARI had not furnished such proof, nor did it bring evidence to show that it actually breached such obligation.

Appendix C

29.' All of the drafts circulated and discussed by the parties were to be signed by ARI. (Plaintiff Party's Exhibits 1, 2, 3, 11, 47, 48, 53, 54 and 55; Defendant Party's Exhibits 1-A, 1-B, 1-C, 1-D and 2).

30. The authorization that Mr. Irelan gave to begin the sale of shoes at some of the NYDS stores while the negotiations were completed was given to ARI. However, the entity that began to sell shoes at the NYDS stores was ERSI rather than ARI. The fact that it had been ERSI making the sales that were authorized in the departments of some of the stores was not disclosed to NYDS until the month of October 1995, as part of the discovery done in this case.

31. On September 1st, 1993, without ARI having yet returned to NYDS the proposed agreement signed, Mr. Irelan faxed a letter to Mr. Rodríguez wherein he informed him that said proposed agreement would not be approved unless clause 22 of the agreement were amended with the aim of allowing NYDS to cancel it if the stores or stock were to be sold, and that, furthermore, the final agreement would have to be approved by the Board of Directors of NYDS. In the letter of reference, Mr. Irelan further requested of Mr. Rodríguez that he return the unsigned agreement draft so that the clause that the Board of Directors of NYDS demanded as a condition prior to its approval could be included. That letter contained the language that Mr. Dell prepared together with Messrs. Crossland and Zapata, following the meeting at the end of August 1993. The reading of the proposed amendment shows that its terms are essentially the same as the ones originally contained in clause 22, which ARI had rejected.

Appendix C

32. The letter of September 1st, 1993 from Mr. Irelan was the first indication that the license agreement would be submitted to the Board of Directors of NYDS for approval. By then, ARI was already operating five departments. Messrs. Irelan and Zapata were in agreement with the fact that, during the negotiation and before the departments began to operate, they did not advise ARI that the license agreement would be submitted to the Board of Directors for approval.

33. On September 13, 1993, Mr. Emilio Rodríguez Jarabo wrote to Mr. Glen Irelan, returning to him a signed copy of the agreement and informing him that he was not accepting the proposed amendment because it was completely contrary to what had been covenanted. Mr. Irelan acknowledged that this communication from Mr. Rodríguez constituted a rejection of the amendment that he had proposed. NYDS did not answer this letter. In addition to the signature and initials of Mr. E. Rodríguez, the signed copy of the agreement contained a number of modifications that Mr. Rodríguez had unilaterally made in his own handwriting. Plaintiff's Exhibit 11.

The alterations or modifications made by Mr. Emilio Rodríguez to the agreement signed by Mr. Glen Dell were the following:

Appendix C

Agreement Page	Word, phrase replaced or added	Word, phrase added
1	open	to be decided
1	—	decision
1	opened	taken
2	—	under retail[4] regular price
2		or not to
2		or not
4		within 5 days

The Court concludes that said modifications, because they are not material, did not have the effect of altering the essential terms and conditions of the agreement.

34. The parties subsequently met during the month of October to agree as to the opening of the Shoe Department at the Caguas store, which began to operate during that same month.

35. In or around December 1993, NYDS proposed to ARI that they sign a document that it titled "Addendum," whose aim was to amend the license agreement in order to allow NYDS to cancel it before its expiration if its stores were sold. The text of the "Addendum" was the same as that

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4. The price at which Almacenes Rodríguez could sell the purses had been discussed and agreed at prior meetings and was being implemented in the shoe departments already opened. What was done in the agreement was to incorporate what had already been agreed.

of the amendment that Mr. Irelan proposed in his letter of September 1st, 1993, which ARI had already rejected.

36. Mr. Emilio Rodríguez Jarabo discussed the proposed "Addendum" with his brother Tomás and his father, Don Emilio Rodríguez Nigaglioni, who consulted the matter with his attorney, Eduardo Franklin, Esq.

37. At the middle or end of December 1993, Mr. Emilio Rodríguez Jarabo met with Messrs. Irelan and Zapata to discuss the petition to amend the agreement. At that meeting, Mr. Irelan insisted that the text of the "Addendum" was beneficial for ARI. Mr. Rodríguez Jarabo rebutted by showing him a written opinion from Mr. Franklin which established otherwise and, in consequence, rejected it again.

38. Mr. Franklin, whom the Court found to deserve full credibility, testified that back at the beginning of the month of December 1993, the stockholder of the plaintiff corporations, Mr. Emilio Rodríguez Nigaglioni ("Don Milo"), consulted him regarding the "Addendum" to the agreement between ARI and NYDS; that he answered the consultation in writing through a letter sent to Don Milo and dated December 10, 1993. Finally, that the documents that he had before him and which he reviewed during the process of answering the consultation made were a document titled "Addendum" and the document that plaintiffs contend constitutes the agreement between the parties, the one which has the two signatures and the initials duplicated. Plaintiff Party's Exhibit 11.

39. That being the state of things, on February 8, 1994 Mr. Zapata wrote to ARI telling it that ". . . (u)pon reviewing

the records related *to the concession of you with us*, we found that the "Addendum" that I am enclosing is unsigned . . ." (underscoring ours) and requested that it be returned to him signed. The text of the "Addendum" was essentially the same as the one that Mr. Rodríguez Jarabo had previously rejected.

40. On or around February 18, 1994, Messrs. Emilio and Tomás Rodríguez Jarabo met with Messrs. Irelan and Zapata, at the request of the latter, in the offices of NYDS. On that occasion, the parties agreed to replace the pages of the License Agreement that had the handwritten clarifications by Mr. Rodríguez and decided to initial them and sign again the rest of the pages that they had previously signed. The idea was to avoid having to read again all of the other clauses that suffered no modification. This is why the final version of the license agreement has double initials in all of its pages, single initials in the pages that were replaced and double signature at the end.

The modifications that Mr. Emilio Rodríguez made to the signed agreement that Mr. Glen Dell sent him were incorporated in said document. Plaintiff's Exhibit 12.

41. At that meeting, Mr. Irelan insisted on the "Addendum." Mr. Rodríguez Jarabo rejected it anew and offered to confirm his rejection in writing.

42. After the meeting ended, Mr. Emilio Rodríguez Jarabo headed toward Mr. Franklin's office, with whom he met to prepare the text of the letter that he offered Mr. Irelan.

43. On March 4, 1994, Mr. Emilio Rodríguez Jarabo wrote to Mr. Irelan confirming that he would not execute

the "Addendum" because its purpose was ". . . to shorten or eliminate the initial term or that of the extension options existing under the current license agreement . . ." Plaintiff Party's Exhibit 14.

44. Mr. Irelan answered this letter through another one of March 9, 1994 (Plaintiff Party's Exhibit 15), wherein he expressed his disappointment over ARI's rejection and confirmed that the end sought with the execution of the "Addendum" was to amend the agreement to facilitate the sale of NYDS in the future. He also threatened with taking retaliatory measures, informing him that he would not allow the opening of additional departments and that he would relocate the existing ones.

45. Through a letter of March 25, 1994, ARI repudiated the threat by NYDS, warning that although it preferred that business be conducted cordially, it would not be intimidated and that, if necessary, it would resort to the courts to enforce its rights.

46. In the meantime, the stockholder of NYDS, NYDS Holding Limited, a corporation organized in the Grand Cayman Islands, was negotiating with Marshalls for the purchase and sale of the NYDS stock. Mr. Glenn Dell was in charge of that negotiation.

47. One month later, on April 20, 1994, Marshalls, Inc. and NYDS Holding Limited executed an agreement for the purchase and sale of the NYDS stock. In said agreement, the NYDS stockholder represented to Marshalls that the license agreement of May 19, 1993 between NYDS and ARI

was one of the materially important agreements in the deal, that it was in effect, and that neither of the parties had breached it. Plaintiff Party's Exhibit 41.

48. Some days later, Messrs. Irelan and Glenn Dell, together with other executives, visited the offices of ARI to inform for the first time that the NYDS operation would be sold to another operator, whose identity they did not disclose, and that, therefore, they were giving notice that the stores would close to the public, and that the license agreement would terminate. On that occasion, they offered to compensate ARI for the premature cancellation of the agreement. On April 26, 1994, NYDS confirmed by letter the offer to terminate the license agreement. The letter begins by saying and we quote: "In this letter we confirm our proposal for the termination *of our license agreement dated May 19, 1993* . . .". Plaintiff Party's Exhibit 37 (emphasis added).

49. During his visit to the Island, Messrs. Rodríguez expressed to Mr. Dell the interest of Almacenes Rodríguez in remaining as the operator of the shoe departments and, requested of Dell that he communicate their wish to the new owners of NYDS, to which Mr. Dell agreed.

50. Some days later, Mr. Dell met with the representatives of Marshalls and informed them about the interest of Almacenes Rodríguez in remaining as operator of the shoe departments. The representatives of Marshalls explained to Mr. Dell that an operation of that kind was not in tune with their concept of marketing and rejected the offering. Through Mr. Irelan, Mr. Dell sent the message to Messrs. Rodríguez about the buyer's decision.

Appendix C

51. The clearance sale at the NYDS stores began in the month of May 1994 and ran through July 18, 1994, at which time operations ceased.

52. NYDS allowed ARI to participate in the clearance sale, at the end of which ERSI left the NYDS spaces.

53. In the month of November 1994, some of the NYDS stores reopened under the commercial name of Marshalls and under the marketing concept of their new owners, which was different from that of full-line department stores.

54. The exemplary list of powers that the Board of Directors of NYDS reserved for itself included, according to Minutes of July 28, 1988, among other matters, approving agreements that committed the assets of the Corporation in excess of $50,000.

55. With the aim of avoiding future confusion concerning the authority of the President of NYDS to negotiate certain agreements, in September 1995 the Board of Directors amended its corporate powers to reiterate that the Board reserved for itself the authority to approve license and sublease agreements.

56. The Board of Directors knew that ARI operated the shoe departments, tolerated it and received the economic benefits of said operation.

57. For the space of one year, ARI operated seven shoe departments and paid NYDS a 15% of the sales for the licensing right. Both parties, by mutual agreement, approved

and adopted administrative procedures to implement the operational aspects of the agreement.

In harmony with the foregoing findings of facts, the Court formulates the following:

CONCLUSIONS OF LAW

Taking into consideration the proven facts, we have in the case at hand the situation of some negotiations that, after a lengthy process, finally culminated in some documents that are signed by the representatives of both parties that were in charge of the negotiation. Plaintiff Party's Exhibits 11 and 12. Said documents bear the date of May 19, 1993. Plaintiff party contends, based on said documents, that when the document was signed seven of the ten departments covenanted had already been established and were operating, and that the license agreement had already been perfected.

On the other hand, defendant party contends that the agreement was never perfected, because plaintiff party returned it with alterations; it refused to sign an "addendum" which was part of the agreement; that said agreement required the approval of the Board of Directors; that the authorization to operate the shoe departments was merely an accommodation and that, in any event, ARI breached it upon assigning it to ERSI, without the prior authorization of NYDS.

Therefore, in this first stage of the case we must decide whether the negotiations between the parties culminated in a valid and binding agreement for them.

Appendix C

I. *The license agreement was perfected.*

Article 1206 of our Civil Code provides that a contract exists ". . . from the moment that one or more persons consent to bind themselves with respect to another or others, to give some thing, or render some service." 31 LPRA Sec. 3371.

For a contract to exist, the following three requisites must concur: (1) *consent of the contracting parties*; (2) a definite object as the subject matter of the contract; (3) consideration for the obligation established. 31 LPRA Sec. 3391. The Code also provides that ". . . contracts *are perfected by mere consent*, and are binding since then, not only for the performance of what has been expressly covenanted, but also for all of the consequences that pursuant to their nature are in accordance with good faith, usage and the law." 31 LPRA Sec. 3375 (emphasis added).

Consent is produced by the concurrence of the offer and of the acceptance concerning the thing and the consideration which are to constitute the contract. Article 1214 of our Civil Code states as follows:

> "Consent is manifested by the concurrence of the offer and of the acceptance concerning the thing and the consideration which are to constitute the contract.
>
> Acceptance made by letter does not bind the offeror until it becomes known to him. The contract, in such case, is presumed to have been executed in the place where the offer was made." 31 LPRA Sec. 3401.

Appendix C

The acceptance of the offer constitutes the normal procedure for the perfection of the contract. In this way the consent of the parties, which is an essential requisite for the contract to exist, is manifested. ***Producciones Tommy Muñiz v. Copan*, 113 DPR 517, 521 (1982).** This case summarizes the doctrine in the following terms:

> "That is to say, the obligational tie between the parties arises from the meeting of the minds manifested by the offer and the acceptance. But for it to be so, it is essential that the offer fulfill certain requirements, among which stands out, because of its importance in the case at hand, that the offeror's declaration of will be complete, that it contain all of the essential elements of the contract deemed to be necessary, so that the contract may be perfected by the mere acceptance of the offer." L. Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial*, Madrid, Ed. Tecnos, 1979, Vol. I, p. 193; J. Puig Brutau, *Fundamentos de Derecho Civil*, Barcelona, Ed. Bosch, 1977, T. II, vol. 2, pp. 74-75; J. Castán Tobeñas, *Derecho Civil en Puerto Rico*, Barcelona, Ediciones Jurídicas, 1973, T. III, Vol. I, pp. 481-482. Puig Brutau emphasizes that "(t)he only true offer is that which is able to generate the contract with the mere acceptance." Op. cit., p. 180, n. 14. Moreno Quesada expresses himself along the same lines:
>
> "Another requirement for the existence of a true offer is that it contain the essential elements

> of the deal which is sought to be made, . . . in such a way that by acceptance, that is to say, by the mere adhesion of the person to whom it is addressed, the contract may arise; and this is so because, the offer with the acceptance being what is fundamental in the contract, if their concurrence were not sufficient for its formation and resort had to be made to a new agreement, the value of the original proposal would not be a true offer, but rather a preliminary step aimed at the formulation thereof. Thus, we shall have an offer when it contains the elements essential for the formation of the contract, in such a way that, in order to know its contents, a new agreement between the parties not be necessary when the acceptance has taken place." B. Moreno Quesada, *La Oferta de Contrato*, Barcelona, Colección Nereo, 1963, pp. 64-65. ***Producciones Tommy Muñiz v. COPAN***, supra, 522.

Consent may be express or implied. The controlling aspect is that the declarant have adequate knowledge of the import of his declaration. ***Colón Gutiérrez v. Registrador*, 114 DPR 850, 863 (9183).** The implied one is inferred from the conduct of persons and not from the words that they may use to express it. Our Supreme Court has said on the subject that:

> ". . . consent is considered implied when it is the result 'of facts and not of sayings.' F. De Castro y Bravo, *El Negocio Jurídico*, Madrid, Ed. Ins. Nac. Est. Jur., 1967, sec. 84, p. 67. The facts

should unequivocally disclose the will to consent. They can not be compatible with another intent nor be subject to different interpretations. F. Puig Peña, *Compendio de Derecho Civil Español*, Barcelona, Ed. Nauta, 1966, T. 1, p. 620; F. Soto Nieto, *La Estimación Jurídica del Silencio*, 11 Rev. Der. Esp. y Amer. 121 (1966)." ***Teacher's Annuity v. Soc. de Gananciales*, 115 DPR 277, 289-290 (1984).**

It follows from the above that, to determine if the contract at hand was perfected, it will be necessary to determine if the following elements are present: (1) whether an offer existed; (2) whether the offer was complete with respect to the essential elements of the contract; and (3) whether the offer was accepted, be it expressly or impliedly. The concurrence of these shall determine whether the contract was perfected. ***Producciones Tommy Muñiz v. Copan***, supra, 521-522. The Court decides that, in the situation at hand, the presence of these three elements was satisfactorily established.

The business relationship between the parties began at the initiative of NYDS, which proposed to ARI that it take charge of the shoe departments. The evidence shows that the parties went through a protracted and thorough negotiation process which culminated with the license agreement of May 19, 1993. During the negotiation phase, ARI let NYDS know that it was of vital importance that it be offered protection against the termination of the agreement if the operation of the NYDS stores were transferred to a third party. NYDS, with the involvement of its attorney,

prepared all of the drafts of the agreement that it proposed and, in consequence, prepared and proposed the text of clause 22 in the final agreement, which ARI accepted. The text of said clause, in its pertinent part, is the following:

> "It is agreed that if the licensor sells the entire store to another department store operator, the licensee's license arrangement *will remain in effect* and should be included as part of the sale transaction. If all of the stores of the licensor are sold to another operator, it is agreed that *its license agreement between the licensee and the licensor shall be part of that sale transaction and shall remain in place.*" (emphasis added)

The evidence is clear in the sense that, once the parties reached agreement in relation to the text of this clause, there was no need to touch upon this subject again. It was likewise satisfactorily shown that the agreement that NYDS prepared and submitted contained all of the essential elements that the parties had negotiated, and that the modifications[5] that Mr. Rodríguez introduced in it did not alter or change the essence of what they had agreed. In consequence, based on the preponderance of the evidence, the Court decides that there was an offer and that it was complete.

The Court further decides that the conduct and behavior of NYDS show that it accepted the agreement since, as soon as ARI began to operate in the departments, it adopted administrative procedures consistent with its terms to

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5. See finding of facts number 33.

implement the operational aspects of the deal, even in accordance with the modifications that Mr. Rodríguez inserted.[6] Furthermore, it informed the managers of its stores that the agreement had been formalized; demanded ARI's specific performance by asking that it furnish evidence of having insurance and provide a hold harmless agreement; charged and received from ARI the rental fee covenanted, equal to 15% of the sales; represented to Marshalls that it was valid, that it was in effect and had not been breached by either of the parties; proposed to ARI an arrangement to terminate it before its expiration and, in general, abided by it and acted in accordance with its terms.

The Court decides that the facts proven in this case establish that the conduct and actions of NYDS contradict its position and unequivocally show its will to consent. It is a known fact that there is no room for contradictory conduct in law. A party to a contract can not assume a conduct different from the one that it originally assumed, with which it created a state of law that gained the trust of a third party, who relied upon and acted on the basis of that original behavior. ***International General Electric v. Concrete Builders*, 104 DPR 871-876 (1976).** Nobody can go against

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6. The position of NYDS, as testified by Mr. Irelan, is that it adopted the operational aspects of the agreement just to instill some order in the operation. Although this contention of NYDS deserves no credit from the Court because it is contrary to its own actions, the truth is that there is no room for such conduct in our legal systems either, since the fulfillment of contracts cannot be left to the will of one of the contracting parties. Civil Code of Puerto Rico, Article 1208, 31 LPRA Sec. 3373. In consequence, the NYDS was not at liberty to adopt some things and reject others.

his own actions and, in the absence of fraud or dolus or some reason of public order, it is not permissible that a party go back on its own actions. ***Lausell Marxuach v. Díaz de Ñañes*, 103 DPR 533, 538 (1975).** See also ***Velilla v. Pueblo Supermarkets, Inc.*, 111 DPR 585, 587-588 (1981); *Producciones Tommy Muñiz v. Copan***, supra, 530.

NYDS contends that, for there to be a binding and obligatory offer, it has to be complete, the offeree has to be made aware of the willingness to be bound and acceptance has to be unconditional. That is to say, that if a party accepts an offer with modifications or conditions other than those included in the original offer, we are not in the presence of an acceptance that perfects a contract, but before a counteroffer that requires acceptance by the offeror before it can be deemed binding. ***K-Mart Corp. v. Davis*, 756 F. Supp. 62 (1991).**

According to the evidence, the document with the modifications was signed and returned by ARI to NYDS on September 13, 1993. Plaintiff Party's Exhibit 11. The modifications were then accepted by NYDS and the final document was signed and executed on or around February 18, 1994, but with the same date of May 19, 1993. Plaintiff Party's Exhibit 12.

We resolve that NYDS is not right in its contention. In this case one has to take into consideration the course that the negotiations followed, the stage at which they were when ARI returned the document signed with the modifications, and the nature and scope of said modifications. The modifications were so slight and insubstantial that NYDS

signed them without any further discussions. These, as they appear from finding of facts number 33, do not go to the substance of the agreement. It would be an absurdity to resolve that there was no contract in this case because the offer was not complete, particularly when, in parallel with the drafting of the document, the agreement was being executed in its substantial clauses and conditions, which had been negotiated and had just to be formalized in writing, as happened subsequently.

NYDS further states that, when it received the document signed by ARI, it had already withdrawn the offer through the letter of September 1st, 1993 and that, therefore, there was nothing that could be accepted by ARI. It is not right in said contention either. We reiterate that by that date the agreement was well on its way to execution, wherefore NYDS could not withdraw it unilaterally, without any liability for its action. In any event, it could paralyze the execution only as to those shoe departments that had yet to be opened.

In consequence, the license agreement of May 19, 1993 was perfected, considering that there was an offer, complete in all of its essential aspects, and the conduct of both parties shows the will to consent to its terms and, therefore, it was accepted on the part of NYDS. ***Teacher's Annuity v. Sociedad de Gananciales*, supra, 289-290 (1984); *Producciones Tommy Muñiz v. Copan*,** supra, 521-522. Therefore, the contract was perfected.

Appendix C

II. *The license agreement binds NYDS.*

NYDS also adduces that there is no contract because its Board of Directors did not approve it; that Mr. Irelan, its President, had not authority to bind it in the negotiation that he held with ARI; and, that it was allowed to do business without a contract as an accommodation.

In corporate law, it is acknowledged that the president of a corporation has authority to carry out ordinary transactions without a need for the express approval of the board of directors. Thus, for example, the purchasing of materials and equipment, the hiring of employees, the leasing of equipment and others are deemed to be transactions of a usual nature that do not have to be taken before the board. Luis Mariano Negrón Portillo, *Derecho Corporativo Puertorriqueño*, p. 181, Segunda Edición, 1996.

It has also been recognized that the actions of a corporate officer who has no express or implied authority bind the corporation when the latter gives the impression that the former had the authority to do what he did, when this impression has been conveyed to the person who contracts with the corporation by a person other than the officer in question. Negrón Portillo, supra, p. 182.

When the officers of a corporation have acted in its behalf as its functionaries, for a reasonably continuous period of time, without the corporation challenging their actions, inducing third parties and the public to think that they really are its functionaries, their actions bind the entity. The reason behind this is that the public and third parties should not be

forced to carry out continuous investigations about the legality of the status of the apparent functionaries, because the right of third parties to rely on appearances is recognized. Therefore, the corporation is barred from evading the consequence of their actions. Negrón Portillo, supra, pp. 182-193; ***Vergne v. Tribunal*, 77 DPR 22, 23 (1954).**

The analysis of the cases and the main body of commentaries favor the principle of imposing liability when the actions of the corporate officer or functionary have been tolerated by the entity, after learning about the transaction, and the corporation derives economic benefit from those actions and does not disclaim or revoke them. Negrón Portillo, supra, p.184.

***Reece Corp. v. Ariela, Inc.*, 122 DPR 270 (1988),** is the most recent case decided by our Supreme Court which deals with the liability of the corporation for the actions of its officers. The doctrine is summarized therein in the following manner:

> ". . . In the absence of corporate or other types of documents that accurately establish the powers and the authority of a corporate officer, it is presumed that he has implied authority to carry out those functions that are framed within the scope of the ordinary business of the corporation. (citations omitted). The office entails the granting of that degree of authority necessary for the performance of the actions required for the adequate managing of the corporate business. Fletcher, supra. In addition to expressly delegated

authority, corporate managers may possess an implied authority, be it because of the nature of their positions or because of the manner in which the business of the corporation has been conducted in the past. (citations omitted)

* * *

"The corporation that charges a manager with the general supervision of a division or section of its business, *in the absence of documentation to the contrary*, invests said manager with those general management prerogatives that coexist with the business or operations with which he has been entrusted. Therefore, the corporation is bound by the contracts that such manager executes within the parameters of his authority. (citations omitted) In this way, the division manager of a manufacturing corporation has the implied authority to execute those contracts aimed at the sale of products, without the need of routing the purchase orders to the main office of the corporation, particularly when in previous agreements or contracts between those same parties, the ratification of the contract by the corporation was never required. (citations omitted) (emphasis added)

* * *

Now then, the authority of a corporate manager extends to those matters or transactions

> that are incidental to the ordinary affairs of a corporation. Fletcher, supra, Vol. 2A, Sec. 667. At the point in time when a general manager has an extraordinary matter before him, he would need the authorization of the pertinent corporate organisms or officers to commit it. Should the manager not have that authorization, he would be acting beyond the scope of his implied authority. ***Porshin v. Snider*, 212 N.E. 2d 216 (Mass. 1965). *Reece Corp. v. Ariela, Inc.*, supra, 281-283."**

Finally, this decision highlights the principle that a person who does business or contracts with the manager of a corporation is entitled to assume that the person with whom he is contracting has the authority to bind the corporation with his actions. ***Reece Corp. v. Ariela, Inc.*, supra, 285.**

In sum, the actions of a corporate officer bind the corporation (i) when they refer to business or transactions of an ordinary nature or, (ii) in the absence of express or implied authority, when the corporation gives the impression that the officer enjoys authority or, (iii) when the corporation tolerates the actions, deriving benefit, and does not disclaim or revoke them.

The foregoing doctrinal analysis, and its application to the facts of this case, confirms that the actions of Messrs. Irelan and Zapata, and of the Board of Directors of NYDS itself, were indeed binding upon it for several reasons.

In the first place, Mr. Irelan was the President and chief executive officer of the corporation, and was the person

whom the Board of Directors charged with the commission of getting the licensee and negotiating the agreement. This is an important factor because in ***Reece Corp. v. Ariela, Inc.*, supra,** it was determined that the actions of a manager, who is not even an officer, bound the corporation. Here it is the president, the highest-ranking corporate officer.

Second, NYDS proposed the agreement and was the one who drafted it with the intervention of its attorney, and even drafted and proposed clause 22 which offered ARI protection. The involvement of said attorney and the intervention of Mr. Zapata during the negotiation created the impression that Mr. Irelan had authority to negotiate and bind NYDS, since both abided by his decisions and directives.

Third, NYDS had previously granted the operation of the shoe department to other licensees, as well as that of other departments. It is, therefore, the type of deal that it was used to making in the ordinary course of business. So much so, that it already had a standard license agreement form in its files.

Fourth, the granting of licenses is the type of common, ordinary deal that it delegated on its officers and that did not require the involvement of the Board of Directors. It is so evidenced by the then current list of corporate matters that had to be submitted for approval by the Board, among which the execution of license agreements did not figure in any way nor in an implied manner, as required by ***Reece v. Ariela, Inc.*, supra.** To that effect, examine the document titled Exhibit A, containing two pages, within defendant party's Exhibit 41, which consists of the listing of matters reserved for the Board of Directors.

Fifth, NYDS invoked the agreement to demand the specific performance of its clauses, specifically regarding the obligation of providing insurance and a Hold Harmless Agreement. See Defendant Party's Exhibit 3. Furthermore, it proposed amending it.

Sixth, the license agreement of May 19, 1993 does not contain any clause that provides that its effectiveness is subject to its being approved or being ratified by the Board of Directors of NYDS. Neither was ARI advised about it during the precontractual phase, nor before it began to operate the departments. In fact, it was first brought up as of September 1st, 1993, when conversations for the sale of the stores had already begun.

Seventh, Messrs. Irelan and Zapata, both directors of the corporation, periodically reported to the other members of the Board about the development of the negotiation. It must have been informed about the important details of the negotiations at that meeting. The explanation that the Court was given is that the Board of Directors was waiting for the agreement signed by ARI to be submitted to it to then pass judgment on whether to accept it or not. This, apart from not being credible, shows lack of prudence and of diligence, since the agreement was being executed parallelly with the negotiations. NYDS knew or should have known, that in our jurisdiction preliminary negotiations may generate liability.

Eighth, NYDS had the need to maintain its stores operating with a shoe department, as Mr. Irelan testified, to continue being commercially attractive, derive the economic benefit resulting from the collection of 15% of ARI's sales, and to eventually sell its operation, as it in fact did.

Ninth, the Board of Directors tolerated the operation of the shoe departments and NYDS derived economic benefit from that operation. Therefore, it ratified the agreement with its tolerance. Negrón Portillo, supra, p. 184.

Under the circumstances indicated, we resolve that ARI acted according to law in assuming that it was contracting with functionaries and officers of NYDS who had the authority to bind it. ***Reece Corp. v. Ariela, Inc.*, supra, 285.**

Had ARI been advised that the agreement had to be approved by the Board of Directors of NYDS, in all probability it would not have embarked on the task of furnishing and operating the shoe departments until said approval had been obtained. Any prudent and reasonable person would have acted in that manner.

In conclusion, the evidence showed clearly and preponderantly that the actions and performance of the President and Vice-President of NYDS, Messrs. Irelan and Zapata, respectively, added to the lack of diligence and foresight of the Board of Directors, and its decision to tolerate the business to derive, as it indeed derived, the economic benefit of that operation, ratified the terms of the license agreement of May 19, 1993. Therefore, the Court resolves that said agreement is binding on NYDS.

III. *The clause of the "addendum," required by NYDS, does not have the effect of voiding what was already negotiated and executed or in the process of execution.*

Taking advantage of the juncture that as of September 1st, 1993 ARI had not returned the agreement

signed, NYDS demands the signing of the "addendum" to complete the negotiation and execute the agreement in writing, to which ARI legitimately refused, because it involved changing a substantial clause of the agreement previously negotiated.

NYDS brings that modification knowing that at the time it was in the full process of finding a buyer for its stores and it was naturally convenient for it that the agreement not contain the already negotiated clause 22, since it was binding on any buyer.

Since ARI refused to sign the "addendum," because it was prejudicial, NYDS, without having incorporated it from the outset as a condition of the agreement and without having previously advised it verbally, has been raising the defense that the agreement required the approval of its Board of Directors.

We have already decided that the agreement, because of the way and manner in which the negotiations developed, because two officers of NYDS were also members of its Board of Directors and because said Board was kept informed at all times about the essential clauses of the agreement, did not require its approval.

Therefore, the contention that the negotiation had not been completed because the incorporation of the "addendum" and the approval of the Board were missing, brought up at a late stage when the sale of the stores was already intended, when negotiations had been practically concluded and when the agreement was well on its way to execution, is not brought in good faith.

Appendix C

"(T)he requirement of good faith is also a general requirement of the law and as such extends to the totality of our legal system. The ethical content of each action is to be examined in the light of its specific circumstances, but behavior in accordance with good faith is a precept that encompasses every juridical activity." ***Velilla v. Pueblo Supermarkets, Inc.*, 111 DPR 585, 587-588 (1981),** Article 1210 of the Civil Code, 31 LPRA Sec. 3375.

"Precepts that refer to good faith in the sense of affording protection to the trust in juridical appearances, are premised on the belief that the other party — the one performing the act of disposing — displays a legitimation that it really lacks . . ." (citations omitted)

The phrase "good faith," as an interpretative standard, means trust, security and honorability based on it. The word "faith," fidelity, means that one of the parties relies trustingly on the "loyal" conduct of the other." ***Berríos v. UPR*, 116 DPR 88, 98 (1985).**

The demands brought up tardily by NYDS, when practically the only thing left to do was to sign the final document, do away with the laudable principle of good faith that is required in every negotiation, wherefore they can not be endorsed by this Court.

"The exercise of a right is illegitimate when the holder manifestly exceeds the limits imposed by good faith or by the social or economic end of that right." In cases like the one at hand, the principle of good faith does not allow the use of the right "to the defense of lack of authority invoked

in this case, "when the right arises from omissions of the other party caused . . ." "by plaintiff party's own conduct." ***Velilla v. Pueblo Supermarkets, Inc.*, supra, p. 588.** And we add, to take advantage of a situation, as happens in this case, that ARI had yet to return the agreement signed.

We resolve, therefore, that the actions of NYDS in invoking the defense of lack of authority of Mr. Irelan and that the agreement required the approval of its Board, under the circumstances that they are invoked in the present case, are tantamount to a waiver thereof, because this Court can not give them legitimacy.

IV. *Almacenes Rodríguez did not breach the license agreement.*

On the other hand, NYDS contends that ARI is barred from demanding the specific performance of the license agreement because it breached the terms of clause 20 that prohibits the assignment of the rights to third parties. In its pertinent part, the text reads as follows:

> "Assignment Transfer and Sub-lease
>
> 20. Licensee shall not have the right to assign its right under this agreement in whole or in part, without the prior written consent of the Licensor and no portion of said department shall be occupied by anyone other than licensee. In the event of a merger or consolidation in any manner with licensee with or in to another entity, licensor shall have

> the election to be exercised, not later than 90 days after written notice from licensee of this fact, to (i) terminate this agreement, (ii) to recognize such entity as licensee hereunder, in which case such other entity shall assume all of the obligations of licensee under this agreement, executing any and all documents request to be so executed by licensor." (pages 15 and 16 Plaintiff Party's Exhibit 11 and Defendant Party's 2)

From the reading of this provision it appears, first of all, that the agreement is not assignable to third parties, unless there is written consent of defendant party, and second, that this is due to defendant party's interest in not having a third party that does not have its approval in charge of the shoe department.

The contention of NYDS is based on the fact that the operation of the shoe departments was entered in the accounting records of ERSI, a sister corporation of ARI, which is also wholly owned by Don Emilio Rodríguez Nigaglioni, sole stockholder.

The Court resolves that ARI and ERSI have always maintained a close community of interests, since they have always done business jointly. Furthermore, they have a single stockholder, the same management, share the same Board of Directors, the same officers, operate from the same central office, are stocked from a single main warehouse, make transactions between themselves without either making money from the other, are engaged in the same business of

selling shoes, have 26 stores in Puerto Rico and all of them do business under the commercial name "Almacenes Rodríguez," present their financial statements in a combined fashion and, in sum, operate as a single organization, which the public knows and recognizes as "Almacenes Rodríguez."

The Court resolves that, although the operation of the shoe departments was entered in the accounting records of ERSI, it is not a third party insofar as the license agreement is concerned, since both ARI and ERSI are an integrated organization that does business in Puerto Rico under the commercial name of "Almacenes Rodríguez." Therefore, ERSI has a legitimate interest in the license agreement, because it played an important role in seeing to it that said organization successfully fulfill the obligations that the license agreement imposed on it. The Court further resolves that the internal decision of the firm to enter the operations in the accounting records of ERSI does not mean that ARI assigned its rights under said agreement. In fact, there is nothing in the evidence to suggest that ARI assigned its rights.

What is really important is that ARI fulfilled its part of the agreement, providing the inventories, the personnel and all of the management support of its organization to make the operation turn out to be a success, as it in fact was. In this sense, if the sales, cost of merchandise and other expenses were entered in the accounting records of ERI, it is truly irrelevant, because it does not really result in the assignment of the agreement, nor did it release ARI from fulfilling its responsibilities thereunder.

Appendix C

A review of the provisions of the Civil Code that regulate the transmission of incorporeal rights and the interpretative case law shows the legal inadmissibility of the contention of assignment by NYDS.

Article 1065 of the Civil Code provides that ". . . (a)ll rights acquired by virtue of an obligation are transmissible subject to the laws, *should there be no covenant to the contrary*." (emphasis added)

The assignment allows the creditor or assignor to transmit his credit or incorporeal right to the assignee. However, the principle of transmissibility of rights is not absolute ". . . but rather has some limitations that arise at times because of the peculiar characteristics of the credit as a good within commerce, and others, because of the need that the transmission not disrupt the basic principles which are to govern private juridical relationships. José Luis Navarro Pérez, *La Cesión de Créditos en el Derecho Civil Español*, Granada, Editorial Comares, 1988 p. 67"; ***Consejo de Titulares del Condominio Orquídeas v. Corporación de Renovación Urbana y Vivienda, etc.*, 93 JTS 25, p. 10421.**

Commentators and case law have recognized three categories of limitations to the transmissibility of rights or credits, to wit: a) by reason of a prohibition in the law, b) by the eminently personal nature of the right itself or, c) because unassignability has been covenanted. ***Consejo de Titulares del Condominio Orquídeas v. Corporación de Renovación Urbana y Vivienda*, supra, p. 10421.**

Appendix C

The NYDS defeats its contention upon invoking the text of paragraph 20 of the agreement as the spearhead of its argument, which makes a **non-sequitur** of its allegation. That is to say, to the extent that the license agreement contains a covenant that forbids assigning it without having the consent and approval of the NYDS, said agreement is clearly unassignable and, therefore, there is no juridical possibility of transferring its rights. Thus, there can be no assignment when the agreement expressly prohibits it and only admits the transfer of rights if the NYDS approves it beforehand. In the absence of such an approval, there is no valid assignment which will effectively release ARI from liability toward the NYDS.

Upon reviewing the figure of the assignment, our Supreme Court has described it as:

> ". . . a juristic act executed by the assigning creditor with another person, assignee, by virtue of which the former transmits to the latter ownership over the credit right assigned. L. Diez-Picazo, **Fundamentos del Derecho Civil Patrimonial,** Madrid, Ed. Tecnos, 1979, Vol. 1, p. 789. Puig Peña, on his part, indicates that it is that "operation by virtue of which a third party, replacing the creditor, becomes the active owner of an obligation that, nevertheless, remains the same." F. Puig Peña, **Compendio de Derecho Civil Español,** 3rd ed., Madrid, Ed. Pirámide, 1976, T. III, pp. 242-243. ***IBEC v. Banco Comercial*, 117 DPR 371, 376 (1986).**

Appendix C

The assignment of a credit or incorporeal right entails its transfer[7], and to be valid it is essential that it be based on an existing right that has its origin in a valid and effective obligation. It has the effect of placing the assignee in the same position and obligatory relationship that the primitive creditor or assignor had vis-á-vis the debtor, from the moment of transmission of the credit. ***IBEC v. Banco Comercial*, supra, pp. 376-377.**

It is clear from the above, that for the legal act of the assignment to take place it is necessary that the assignor transmit to the assignee the ownership of the right which is the object of the transfer, extinguishing thereby every obligational tie between the assignor and the obligor and producing, in turn, the binding of the latter toward the assignee. There is not the slightest indication in the record that this took place.

In the first place, for an assignment to exist ARI must have necessarily transmitted the ownership of its right to the assignee, resulting in the extinguishment of the obligational tie between it and NYDS, which never took place here, and creating a new obligational tie between NYDS and the assignee. None of this happened and there is nothing in the evidence that suggests that it was actually transmitted.

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7. Our Civil Code considers the assignment to be equal to a sale. However, it has been recognized that the assignment may take place for another consideration such as, for example, the permutation, donation, settlement, contribution to a partnership, and others. ***Consejo de Titulares del Condominio Orquídeas v. CRUV, supra, at p. 10423.***

In the second place, it has also been seen already that for a transmission of incorporeal rights to exist, it must have come about by reason of some consideration such as the sale, permutation or donation of the right in question, which elements have not only not been raised but are nonexistent.

In the third place, for the assignment to be effective it would have to be on the basis of a transmissible right, which does not exist here. Rights whose transmissibility has been limited by agreement of the parties can not be the object of transmission. ***Consejo de Titulares del Condominio Orquídeas v. Corporación de Renovación Urbana y Vivienda*, supra, p. 10421.**

In sum, the Court resolves that there was no assignment of rights under the agreement, because: 1) there was no transmission of rights that would cause ARI to be released from its obligation toward NYDS; 2) there was no consideration; and 3) there wasn't a right without limitations as to its transmissibility. ***Consejo de Titulares del Condominio Orquídeas v. Corporación de Renovación Urbana y Vivienda*, supra, pp. 10420 and 10421.** In conclusion, ARI did not breach the agreement because, as has been shown, there wasn't any such assignment.

Finally, the Court resolves that, in light of the foregoing findings of facts and conclusions of law, it is not necessary to settle the controversy related to the liability of NYDS for **culpa in contrahendo.**

PARTIAL JUDGMENT

Having considered the foregoing Findings of Facts and Conclusions of Law, the Court enters partial judgment, with the following pronouncements:

Appendix C

a) It is declared and decreed that the license agreement of May 19, 1993 was perfected and is valid and binding between the parties; that NYDS canceled it prematurely and breached the obligation that clause 22 thereof imposed on it, to see to it that it was respected and assumed by any person who acquired the operations of its stores.

b) It is ordered that the proceedings continue in this case and the docketing for the trial on the merits on the aspect of damages is reaffirmed for **May 19, 20, 21, 22, 26, 27, 28 and 29, 1997,** at 9:00 A.M.

The Court expressly concludes that there is no reason to postpone issuing this partial judgment until the final resolution of the litigation.

ENTER AND NOTIFY.

Given in San Juan, Puerto Rico, on December 23, 1996.

(sgd.) Wilfredo Alicea López
WILFREDO ALICEA LOPEZ
SUPERIOR COURT JUDGE

CERTIFIED:

CARMEN L. LOPEZ CRUZ
GENERAL CLERK

BY:
(init.) Illeg.
ASST. CLK.

APPENDIX D

DECISION OF THE SUPREME COURT OF PUERTO RICO DENYING FIRST MOTION FOR RECONSIDERATION, DATED JUNE 18, 1999

IN THE SUPREME COURT OF PUERTO RICO

NO. CC-99-210

Almacenes Rodriguez, Inc. et al

Respondents

v.

New York Department Stores de Puerto Rico

Petitioner

RESOLUTION

San Juan, Puerto Rico, June 18, 1999

The First Motion for Reconsideration is denied.

The Court so agreed and the Supreme Court Clerk so certifies. Associate Judge Rebollo López would issue the writ. Associate Judge Mr. Corrada del Río would issue the writ. Associate Judge Mr. Negrón García has disqualified himself. Associate Judge Mr. Rebollo López did not particpate.

(signed)
Isabel Llompart Zeno
Supreme Court Clerk

APPENDIX E

DECISION OF THE SUPREME COURT OF PUERTO RICO DENYING SECOND MOTION FOR RECONSIDERATION, DATED JULY 16, 1999

IN THE SUPREME COURT OF PUERTO RICO

NO. CC-1999-210
CERTIORARI

Almacenes Rodriguez, Inc. and
E. Rodriguez & Sons, Inc.

Plaintiffs-Respondents

v.

New York Department Stores de Puerto Rico, Inc.

Defendant-Petitioner

RESOLUTION

San Juan, Puerto Rico, July 16, 1999

The second motion for reconsideration filed by the defendant petitioner is denied. Abide by this decision.

The Court so resolved and the Supreme Court Clerk so certifies. Associate Judge Rebollo Lopez would reconsider.

(signed)
Isabel Llompart Zeno
Supreme Court Clerk

APPENDIX F

RULE 10(A) OF THE REGULATIONS OF THE PUERTO RICO CIRCUIT COURT OF APPEALS

SUPREME COURT OF PUERTO RICO

RULE 10(A) OF THE
CIRCUIT COURT OF APPEALS

* * *

Rule 10. Decision on the merits

(A) The corresponding panel of the Circuit Court of Appeals shall resolve the writs submitted for its consideration through a resolution or judgment, which shall include a statement of facts and an exposition and analysis of the issues raised.

* * * *